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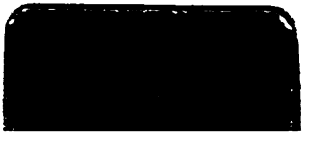
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THE INSTITUTES

A TEXTBOOK OF THE HISTORY AND SYSTEM OF ROMAN PRIVATE LAW

BY

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PREFACE

THE first edition of the English translation of Professor Sohm's 'Institutes' was based on the fourth (1889) edition of the German original. The second edition was based on the eighth and ninth German editions, which were published simultaneously in 1899. The present (the third) edition is based on the twelfth German edition, which appeared in 1905. As compared with the earlier editions, the seventh German edition contained a large number of alterations and additions, most of which were due, directly or indirectly, to the passing of the German Civil Code. The nature and purpose of these alterations and additions, the most important of which were enumerated in the Preface to the second English edition, were explained in Professor Grueber's Introduction to that edition and in the opening sections of the book itself. It does not, however, appear necessary, on the present occasion, to refer again in detail to the changes in question, the subject being sufficiently dealt with—so far as it is now desirable to do so—in Professor Grueber's introductory essay.

The eighth and subsequent German editions only differ in details from the seventh. The eleventh German edition—of which the current (the twelfth) edition is merely a reprint—was carefully revised in the light, more particularly, of the most recent literature on the history of Roman law, and the chapter on the Law of Obligations (especially the section dealing with the contract of sale) was somewhat enlarged.

In this, as in the earlier editions, my sole object has been to produce a faithful translation of Professor Sohm's treatise. I have accordingly adhered in every particular to the arrangement adopted in the original. The English text follows the German text as closely as possible, and the footnotes are all (with the exception of those indicated by asterisks) the author's own. The renderings of certain terms in the original, for which (so far as I am

aware) no recognized English equivalents exist—e. g. 'obligatory right' ('Forderungsrecht'; see note on p. 308), 'petitory action' ('petitorische Klage'), 'heir by necessity' ('Noterbe'), and others—necessarily sound somewhat strange and unfamiliar. The objection to the use of more familiar terms (if any such can be found) is that it often tends to import into the translation associations that are quite foreign to the original.

In preparing this translation I have had the valuable assistance of Professor Grueber, of Munich. I am under a deep obligation to him for all the trouble he has taken in revising the whole MS. of the first edition, and the MS. of the new and altered portions of the second and third editions. The text as it now stands has been approved by Professor Grueber. There cannot, I think, be a better guarantee for its accuracy as a translation.

I have also to thank Sir William Markby and Mr. E. A. Whittuck for many useful suggestions made during the progress of the earlier editions.

J. C. L.

COBHAM, SURREY,
May, 1907.

CONTENTS

PAGE

List of Abbreviations x
Introduction by Professor E. Grueber xi

INTRODUCTION

CHAPTER I

The Nature of the Subject

§ 1. The Reception of Roman Law in Germany 1
§ 2. The Law of the Pandects and German Private Law . . . 2
§ 3. The Law of the Pandects and Codified Law 4
§ 4. The German Civil Code 7
§ 5. The Nature of the Subject to be dealt with 8

CHAPTER II

Sources and Fundamental Conceptions

§ 6. The Sources of Roman Law 16
Appendix. The Manuscripts of the Corpus Juris . . . 19
§ 7. Fundamental Conceptions 22
§ 8. Jurisprudence 28

PART I

THE HISTORY OF ROMAN LAW

Introduction

§ 9. The Quiritary Law. 34
§ 10 The Development of the Civil Law in its Principal Stages . . 42

CHAPTER I

Roman Law as the Law of the City of Rome

§ 11. The Twelve Tables 48
§ 12. The Interpretatio 53
§ 13. The Beginnings of the Jus Gentium 64

CHAPTER II

Roman Law as the Law of the World (The Empire)

PAGE
§ 14. Jus Civile and Jus Gentium 70
§ 15. The Praetorian Edict 73
§ 16. The Dual System of Law 81
§ 17. The Edictum Hadrianum 84
§ 18. Roman Jurisprudence 88
§ 19. The Republican Empire and the Imperial Administration of Justice 104
§ 20. The Monarchical Empire and the Imperial Legislation . . 112
§ 21. Codification 116
§ 22. The Result 125

CHAPTER III

The Subsequent Fate of Roman Law

§ 23. Byzantium 132
§ 24. Italy 133
§ 25. The Glossators 135
§ 26. The Corpus Juris Canonici 138
§ 27. The Commentators 140
§ 28. The Law of the Pandects in Germany 150

PART II

THE SYSTEM OF ROMAN PRIVATE LAW

§ 29. The System of Private Law 158

BOOK I

THE LAW OF PERSONS

§ 30. The Conception of a Person and the Kinds thereof . . . 161

CHAPTER I

Natural Persons

§ 31. Introduction 164
§ 32. Slavery 165
Note. Relationships akin to Slavery 172
§ 33. Cives and Peregrini 173

PAGE
§ 34. Paterfamilias and Filiusfamilias 177
§ 35. Capitis Deminutio 178
§ 36. Existimationis Minutio 182

CHAPTER II

JURISTIC PERSONS

§ 37. The Nature of a Juristic Person 186
§ 38. Societies and Foundations 195

BOOK II

THE LAW OF PROPERTY

CHAPTER I

GENERAL PART

§ 39. Introduction 204

I. JURISTIC ACTS

§ 40. The Conception of a Juristic Act and the Kinds thereof . . 204
§ 41. Requisites of a Juristic Act 206
§ 42. Motive, as affecting Juristic Acts 208
§ 43. The Qualifications of a Juristic Act 213
§ 44. Capacity of Action 216
§ 45. Representation 219

II. THE PROTECTION OF RIGHTS (LAW OF PROCEDURE)

§ 46. Introduction 224
§ 47. Roman Civil Procedure 225
§ 48. The Legis Actio 229
§ 49. The Formulary Procedure 240
§ 50. The Formula 253
§ 51. Intentio and Actio 257
§ 52. The System of Actions 263
§ 53. Condemnatio and Exceptio 266
§ 54. Actio Perpetua and Actio Temporalis. Tempus Utile . . 282
§ 55. The Effect of an Action at Law 285
§ 56. The Procedure Extra Ordinem. Interdicta. In Integrum Restitutio 289
§ 57. The Procedure of the Later Empire 296

CHAPTER II

THE LAW OF THINGS

§ 58. The Conception of a Thing 302
§ 59. The Different Kinds of Things 302
§ 60. Real Rights 307

I. OWNERSHIP

PAGE

§ 61. The Conception of Ownership 309
§ 62. The Acquisition of Ownership. Historical Introduction . . 309
§ 63. The Acquisition of Ownership. A. Derivative Acquisition . . 312
§ 64. The Acquisition of Ownership. B. Original Acquisition . . 316
NOTE. The Different Unions of Things 325
§ 65. The Protection of Ownership 327
§ 66. The Protection of Usucapio Possession 328
§ 67. The Protection of Juristic Possession. Possession and Ownership 330

II. JURA IN RE ALIENA

§ 68. Jura in re aliena in general 337
§ 69. Servitudes 338
§ 70. Emphyteusis 348
§ 71. Superficies 350
§ 72. Pledge 351

CHAPTER III

THE LAW OF OBLIGATIONS

I. THE CONCEPTION AND CONTENTS OF AN OBLIGATION

§ 73. The Conception of an Obligation (Obligatory Right) . . . 358
§ 74. Plurality of Debtors and Creditors 359
§ 75. The Contents of an Obligation 365
§ 76. Stricti Juris Negotia and Bonae Fidei Negotia 367

II. THE MODES IN WHICH OBLIGATIONS ARISE

§ 77. Contracts and Delicts 371

A. Contractual Obligations

§ 78. Introduction 371
§ 79. Real Contracts 375
§ 80. The Verbal Contract 382
§ 81. The Literal Contract 391
§ 82. Consensual Contracts 396
§ 83. Quasi-Contracts 408
§ 84. Pacts 414

B. Delictual Obligations

§ 85. The Private Delicts of Roman Law 417
§ 86. Quasi-Delicts 424

III. TRANSFER AND EXTINCTION OF OBLIGATIONS

§ 87. Transfer of Obligations 425
§ 88. Liability for Debts contracted by Another 428
§ 89. The Extinction of Obligations 433

BOOK III

FAMILY LAW AND THE LAW OF INHERITANCE

CHAPTER I

Family Law

PAGE
§ 90. Introduction 448
§ 91. The Family 449

I. THE LAW OF MARRIAGE

§ 92. Marriage and the Modes of contracting it 452
§ 93. Marital Power 459
§ 94. The Proprietary Relations between Husband and Wife . . 462
§ 95. Dos 465
§ 96. Donatio propter Nuptias 473
§ 97. The Termination of Marriage 474
§ 98. Second Marriages 477
§ 99. Celibacy and Childlessness 478

II. PATRIA POTESTAS

§ 100. The Modes in which Patria Potestas originates 479
§ 101. The Effect of Patria Potestas 482
§ 102. The Extinction of Patria Potestas 486

III. GUARDIANSHIP

§ 103. The Different Kinds of Guardianship 488
§ 104. The Appointment of Guardians 492
§ 105. The Effect of the Guardianship 495
§ 106. Termination of Guardianship 499
§ 107. The State as Guardian-in-Chief 499

CHAPTER II

The Law of Inheritance

§ 108. Hereditary Succession; its Foundation and Conception . . 501
§ 109. Delatio and Acquisitio of the Hereditas 506
§ 110. Hereditas and Bonorum Possessio 515
§ 111. Intestate Succession 530
§ 112. Testamentary Succession 540
§ 113. Succession by Necessity 551
§ 114. The Effect of the Vesting of an Inheritance 560
§ 115. Bequests 567
§ 116. Restrictions on Bequests 573
§ 117. Universal Fideicommissa 574
§ 118. Mortis causa capio 577

Index 579

EXPLANATION OF SOME ABBREVIATIONS

IN THE REFERENCES TO THE GERMAN AUTHORITIES

Abt. = Abteilung.
R. = Recht.
G. = Geschichte.
RG. = Rechtsgeschichte.
RW. = Rechtswissenschaft.
ZS. = Zeitschrift.
Sav. St. = Savigny-Stiftung.

The references to the *Zeitschrift der Savigny-Stiftung* are to the Roman Law section (romanistische Abteilung) of that periodical, except where otherwise stated.

INTRODUCTION

When I was invited to write an Introduction to the first English edition of *The Institutes of Roman Law*, by Professor Sohm (published in 1892), two topics naturally presented themselves for consideration. On the one hand, it seemed desirable to give an account of the gradual development of the science of law on the Continent, so that the reader might be in a position to understand the systematic arrangement of private law which, as the result of that development, has come to be adopted in most Continental codes and textbooks, and, at the same time, to understand the peculiar application of the Continental arrangement to the subject-matter dealt with by Professor Sohm in his *Institutes*. On the other hand, it seemed advisable to explain the influence exercised by Roman law on English law, and to call attention to the drawbacks of the method on which, till then, Roman law had usually been taught in England —the method, namely, of offering commentaries on the texts of the 'Institutes' of Gaius and Justinian—so as to bring out, as clearly as possible, the advantages to be derived by English readers from the study of such a uniform systematic exposition as was presented to them in Professor Sohm's work.

The second English edition (published in 1901), which was translated from the ninth German edition, contained alterations of a far-reaching character and was considerably enlarged. Whereas the first edition consisted, in the main, of a systematic survey of the pure private law of Rome, with some historical additions—the object of the 'Institutes'[1] being to prepare the student for the more detailed lectures on the 'Pandects'—the second edition combined with this systematic survey a brief account of the principal changes which Roman law had undergone when it was 'received' as the Common Law of Germany, and thus furnished a connecting link

[1] See note to p. 9 *infra*.

with the study of the law contained in the new German Civil Code. The historical portion of the book was, moreover, enlarged in such a way as to make it practically an abridged history of Roman law, a history which covered the subsequent fate of the Corpus iuris civilis in the East as well as in the West, and thus contained a complete account of the development of the science of law on the Continent from the days of the Glossators onward.

These changes, which were indicated in the new title of the book 'The Institutes, a Textbook of the History and System of Roman Private Law', were accounted for by the new order of legal instruction in Germany. Accordingly, in the Introduction to the second English edition, I thought it advisable to explain the nature and contents of the systems of legal instruction recognized in Germany before and after the promulgation of the German Civil Code respectively. Though the present (the third) English edition (which is based on the twelfth German edition) is, in essentials, but a (revised) reproduction of the second edition, it will not be necessary, on this occasion, to do more than refer the reader to what was said in the Introduction to that edition. It may not, however, be amiss to repeat in this place that in Germany two courses of lectures are devoted to preparing the student for the exposition of the German Civil Code, one of which, giving a systematic and historical account of Roman law, introduces him to those provisions of the Code which are of Roman origin, while the other, dealing with German legal history and the elements of German private law, prepare him for the study of those provisions of the Code which are of German origin. In addition to these two preparatory courses, there is a third course of lectures which is of a rudimentary character and is known as the 'Introduction to the Science of Law'. These lectures serve to introduce the student to every branch of legal science alike, not only, therefore, to (1) the German Civil Law together with (2) Mercantile Law and Bills of Exchange, but also to (3) Civil Procedure and (4) the Law of Bankruptcy, (5) Criminal Law, (6) Criminal Procedure, (7) Constitutional (and Administrative) Law, (8) International Law and (9) Ecclesiastical Law. All these subjects are dealt with partly separately in numerous

textbooks, partly in works of an 'encyclopaedic' character, i.e. works containing a systematic survey of the entire field of legal science. The 'Encyklopädie' of Professor Birkmeyer, of Munich,[1] is a work of the latter kind. It consists of twelve comprehensive treatises on each of the above twelve subjects[2] and thus presents a summary view of the entire body of law at present in force in Germany. The 'Encyklopädie' of Franz von Holtzendorff, as newly edited by Professor J. Kohler[3], goes beyond the scope of Professor Birkmeyer's work and contains, in addition to articles on the above subjects, a number of separate articles dealing with the philosophy of law, legal history, comparative law, and some other topics—such as the law of workmen's insurance and colonial law—which, though occupying in themselves a subordinate position, are of special importance for the development of modern law. *Die Kultur der Gegenwart, ihre Entwickelung und ihre Ziele*, edited by Professor Hinneberg, of Berlin—a work which is at present in course of publication—is planned as a systematic 'encyclopaedia' of the most comprehensive character. It aims at expounding the leading principles of the entire domain of science, including the natural and technical sciences. Of the large number of volumes of which this work is ultimately intended to consist that dealing with 'Systematic Jurisprudence' (published in 1906) covers the whole field of law, each branch of the subject being dealt with—in reference both to its present position and its future development—by a prominent authority in a systematic treatise of its own.[4]

[1] *Encyklopädie der Rechtswissenschaft*, edited by Karl Birkmeyer; 1st edition, 1901, 2nd edition, 1904 (Berlin). The first article of this work, viz. the 'Introduction to the Science of Law', by the present writer, will shortly appear as a separate reprint, in a revised and enlarged form, under the title *Einführung in die Rechtswissenschaft, eine juristische Encyklopädie und Methodologie*, Berlin, 1907.

[2] The second (1904) edition contains two short additional articles, which are merely supplementary in character, on the criminal law and procedure of the Army.

[3] *Encyklopädie der Rechtswissenschaft in systematischer Bearbeitung, begründet von Franz von Holtzendorff, herausgegeben von Dr. Josef Kohler;* 6th edition (1st edition of the revised work); 2 vols., Leipzig and Berlin, 1904.

[4] *Systematische Rechtswissenschaft*, von R. Stammler, R. Sohm, K. Gareis,

But however useful the study of the Institutes and similar systematic works by German and other Continental writers may be to the English student, it will not afford him any direct assistance in mastering the law of his own country in its present unsystematic condition. In spite of the influence exercised by Roman law on English law (especially during the twelfth and thirteenth centuries), English law has, in the main, developed independently on a foundation of Germanic law. Hence the leading ideas, the conceptions, and the terminology of English law differ widely from those of Continental legal systems. These differences account for the difficulty which English lawyers—even those who possess a sound knowledge of Roman law—experience in entering thoroughly into the spirit of Continental law through the medium of English legal conceptions.[1] When dealing with questions of English law, an English lawyer will necessarily think in terms of English law; when dealing with questions of Roman (or Continental) law, he will try to think in terms of Roman (or Continental) law. In these circumstances the publication of a work like Dr. Ernest Schuster's *Principles of German Civil Law*[2] is particularly welcome. As the work of a practising English barrister, it is eminently fitted to bridge the gulf that at present exists between the English and Continental legal systems. Approaching his task from the point of view of an English lawyer, and availing himself in his exposition of the terminology of English law, the learned author succeeds in clearly explaining to his readers the leading notions and classifications underlying the latest and most perfect attempt to codify the private law of a country: the new Civil Code of the German Empire. The insight thus afforded to English lawyers will necessarily throw fresh light on English legal notions and

V. Ehrenberg. L. v. Bar, L. v. Seuffert, F. v. Liszt, W. Kahl, P. Laband, G. Anschütz, E. Bernatzik, F. v. Martitz. Berlin and Leipzig, 1906.

[1] See Sir H. Maine's Lecture on *Roman Law and Legal Education*, printed in the volume on *Village-Communities in the East and West* (4th edition, p. 341): 'There is a sensible, though invisible and impalpable, barrier which separates the jurists, the moral philosophers, the politicians . . . of the Continent from those who professedly follow the same pursuits in England.'

[2] Oxford, at the Clarendon Press, 1907.

conceptions, and will help to determine their precise nature and orbit, and will thus bring nearer the realization of the great national purpose to which the energies of so many eminent English lawyers —notably Professor Holland, of Oxford—have for so long been devoted: the systematization of English private law. The foundations for all efforts in that direction are to be found, and will always be found, in the study of elementary systematic works of the kind of which Professor Sohm's *Institutes* afford an admirable example—a work which I have now pleasure in introducing for the third time to English readers in its excellent English version.

ERWIN GRUEBER.

THE INSTITUTES

INTRODUCTION

CHAPTER I

THE NATURE OF THE SUBJECT

§ 1. *The Reception of Roman Law in Germany.*

THE great movement in the history of European civilization which substituted the revived spirit of antiquity for mediaeval conceptions and ideas, was consummated in Germany during the sixteenth century. The movement had originated in Italy, and the sixteenth century witnessed its triumphant spread over the whole of Western Europe. Its influence made itself felt in every sphere. Gothic architecture made way for the style of the Renaissance, scholasticism was superseded by humanism. Nor did German law escape being swept along by the mighty current of the new movement. For the national law of Germany had no strong central power to shield and develop it, and could thus offer but imperfect resistance to the inroad of the new ideas. What had been gradually preparing at the close of the Middle Ages was accomplished in the course of the sixteenth century, and Roman law was definitely 'received' in Germany.

From that time onwards Roman law has been an ingredient in the law prevailing in Germany, and the entire history of the latter has moved, ever since the sixteenth century, on the lines of a continuous interaction between the received Roman law and the indigenous German law.

Great, however, as was the material success of Roman law, it was even less remarkable than the influence of Roman law on the scientific thought of Germany. Mediaeval law was not to be found in books. It lived entirely in the memories of men. A science of law was, therefore, a thing unknown in Germany. Thus, when

Roman jurisprudence, as contained and set forth in the Corpus juris civilis, made its way across the Alps, it found, so to speak, an empty territory, which it was able to occupy forthwith without the slightest resistance. German jurisprudence, in fact, dates from the sixteenth century: its existence commences with, and is due to, the reception of Roman law. As the child of Roman jurisprudence it was but natural that, from the very outset, German jurisprudence should bear the impress of its origin. The marvellous sense of form which characterizes all antique art manifests itself clearly in the symmetry, perspicuity, and convincing force of the scientific conceptions of ancient jurisprudence. No sooner, therefore, had Roman law effected its first entrance in Germany, than its own inherent virtues ensured it a rapid and easy victory. Roman jurisprudence came, saw, and conquered. From the sixteenth century to the present day it has dominated all juristic thought in Germany. And this is the reason why, in every plan of legal education in Germany, the first place is assigned to the study of Roman law.

Within the whole field of law, ancient jurisprudence gained its most conspicuous successes in the domain of private law, which means, primarily, the law of proprietary relations, including ownership and obligations. To this day the science of Roman private law forms a fundamental part of German jurisprudence. Hence the Institutes are still concerned with private law in order to supply the beginner with a first introduction to the science with which he has to deal.

§ 2. *The Law of the Pandects and German Private Law.*

The effect of the 'reception' in the sixteenth century was to make Roman private law the common private law of Germany. Roman private law obtained the force of law for the entire German Empire. It came to be known in Germany by the name of the 'Law of the Pandects', because the 'Digesta seu Pandectae' (infra, § 6) formed the principal portion of the Corpus juris civilis. The law of the Pandects, however, did not coincide in all respects with the law of the Corpus juris, the 'pure' private law of Rome. It would obviously have been impossible to apply the Roman law of Justinian (which was the Roman law of the sixth century), a thousand years later, without change, to entirely new circumstances.

It was at the hands of the Italian jurists (infra, § 28) that Germany received the law of the Corpus juris, but it was the law of the Corpus juris modified and developed by the mediaeval legislation of the Church (the Canon law of the Corpus juris canonici), and by the theory and practice of the Italian lawyers. The law thus received was still further modified and developed in Germany itself by Imperial legislation and by the theory and practice of the German lawyers. The law of the Pandects, then, as the positive common law of Germany, was Roman private law adapted to German conditions, and the theory of the Pandect law was accordingly the theory of Roman private law in the altered form which it had assumed on becoming the 'modern' common private law of Germany.

The victory of the Pandect law did not, however, result in the complete extinction of the German private law of indigenous growth which had established itself during the Middle Ages in the shape of numerous local laws, city laws, and territorial laws. A large body of legal rules of native origin remained in force even after the reception of Roman law, but only as the law of particular portions of Germany, whether of localities or cities or territories. Thus the law of the Pandects, as the common law of Germany, was merely subsidiary, supplementing the local laws so far as the latter were defective, but yielding to any conflicting provisions which they contained. Hence the saying, 'City law breaks territorial law, territorial law breaks common law.' What is more, the German jurists engrafted upon the common Pandect law itself not only a number of separate legal rules of native origin, but whole institutions—such as 'family trusts', charges on land (Reallasten), agreements concerning the institution of an heir (Erbverträge)—which had sprung from the indigenous German law and were entirely foreign to Roman law. A substantial portion of the native German private law thus held its ground notwithstanding the reception of the foreign system—for the most part, it is true, in the shape of special local laws, but in a few instances as part of the common law of Germany.

The private law which had sprung from German soil—*German* private law in the fullest sense of the word—had obviously as much claim to scientific treatment as the law of the Pandects. The latter, however, continued to engage the almost exclusive attention of students of private law in Germany down to the eighteenth century. But from the eighteenth century onwards

'German Private Law' (Deutsches Privatrecht)—as the new branch of legal study came to be called—definitely took its place in the legal curriculum side by side with the Pandect law. As distinguished from the books on the Pandects, which were concerned with the 'received' private law of foreign origin, the books on German Private Law were concerned with the private law of Germany so far as it was of native origin. The subject-matter of German Private Law accordingly comprised both the indigenous portions of the *common* private law of Germany—that is, besides the institutions already mentioned (family trusts, charges on land, and 'Erbverträge', supra, p. 3), the feudal law of the Lombards which had likewise been received—and further those portions of the native law which had survived the reception in the shape of 'particular' laws. Inasmuch, however, as the native German law found its principal stay and refuge in these particular laws, German Private Law became pre-eminently the general science of the various *particular* laws of Germany, as opposed to the law of the Pandects, which was the science of the *common* law of Germany.

Thus the private law of Germany was dealt with in two distinct branches of study corresponding to its twofold origin: first, in the law of the Pandects, and secondly, in German Private Law, the former having for its subject the common private law of Roman origin, the latter the indigenous private law, existing for the most part only in the shape of 'particular' laws. Of the two branches the law of the Pandects was the older, the larger, and the more powerful. But the younger branch grew steadily in importance: inwardly it became less and less dependent on its older rival, and consequently increased in outward power, so that it gradually became the stronghold of national legal ideas as against the claims of the foreign ideas imported from Roman law.

§ 3. *The Law of the Pandects and Codified Law.*

The law of the Pandects had established itself in Germany as being the common private law of the so-called Holy Roman Empire of the German Nation. The decline of the ancient Empire necessarily involved a decline of the authority attaching to the law of the Pandects.

From the eighteenth century onwards the initiative in regard to

legislation was taken by the governments of the separate German States. Some of the legislatures, more especially those of the smaller States, contented themselves with legislating on single topics; that is, they confined themselves to working out the particular laws of their respective States, leaving the subsidiary force of the common Pandect law within their territories untouched. In the larger States, however, the idea of a codification struck root, the idea, in other words, of recasting afresh the law as a whole: private law, criminal law, and the law of procedure. The formal effect of a codification is to set aside the existing law in its entirety, as far as the territory affected is concerned, and to substitute for all the laws transmitted from the past a single new code. The condition of the private law of Germany called for a remedy of this kind. The dualism of the private law, the antithesis between the common Roman law and the particular German law—which latter was of the most heterogeneous character—could only be removed by means of a new code which should fuse Roman and German law into a complete whole. But as long as no strong German Empire was forthcoming, the necessary momentum for such an achievement was lacking, and the task of codification therefore devolved on the separate legislatures of the larger German States. Thus it came about that the law was codified for considerable parts of Germany—the private law, as well as the criminal law and the law of procedure—and within these parts the law of the Pandects ceased henceforth to have the force of law.

The whole of Germany was accordingly divided into two great territories corresponding to the form in which its private law presented itself. This division continued till January 1, 1900.

The territory of the law of the Pandects, or (as it was also called) the territory of the common law, was that portion of Germany in which Roman private law—in the form in which it had obtained recognition as the common law of Germany—maintained its formal validity and continued to be enforced, except where expressly altered by special local laws. This territory embraced Holstein with some parts of Schleswig[1], the Hanse towns, Lauenburg, Mecklenburg,

[1] In the greater part of Schleswig, the so-called Jütisch Low of King Valdemar II of Denmark (A.D. 1240) was in force in the form of a Low German translation dating from the end of the sixteenth century. Roman law had never been received in the territory governed by the Jütisch Low. Apart from isolated institutions to which it applied, it operated, for the

part of Hither Pomerania (Neuvorpommern) and Rügen, the greater part of Hanover, Oldenburg (except the Principality of Birkenfeld), Brunswick, the Thuringian Duchies, Lippe-Detmold, Schaumburg-Lippe, Waldeck, the district of the former Appellate Court of Ehrenbreitstein, Hesse-Nassau, Hesse-Darmstadt (except Rhenish Hesse), Hohenzollern, Württemberg and Bavaria (except the Palatinate and the Franconian principalities). It constituted one large and continuous stretch of land, extending from Schleswig-Holstein in the north to Bavaria in the south. In all these countries many laws had been enacted setting aside the rules of Roman private law, in some parts but sparingly, in others on a larger scale. But the force of Roman private law as a subsidiary common law remained unaffected throughout the whole of this territory, in other words, it continued to be valid in all cases where not directly overridden by the contrary provisions of particular laws.

The territory of the codified private law was the territory where the formal validity of Roman private law had been set aside in favour of exhaustive local codes governing the entire private law of the land. All these codes, however, had, in substance, adopted a large number of the principles of Roman law. This territory comprised those portions of Germany which were governed by the Prussian Landrecht of 1794, the French Civil Code of 1804 (which was in force on the left bank of the Rhine, as well as in Baden in the shape of the Baden Landrecht of 1809), and the Royal Saxon Civil Code of 1863. In the western territories of the Austro-Hungarian Empire (on this side of the Leytha) the law of the Pandects prevailed till 1811, in which year it was superseded by the Austrian Civil Code. Almost the entire eastern half of Germany to the right of the Elbe, and the extreme west to the left of the Rhine, were already governed by civil codes.

The time for definitively putting an end to the legal authority of the Pandect law had now arrived.

rest, merely as a 'ratio scripta', i.e. so far only as it gave expression to such requirements as sprang from equity and the general nature of the circumstances in question. The same is true to this day of Roman law in the Swiss cantons, except where the law has been codified. It was expressly received, in the sense of obtaining formal subsidiary force of law, only in those portions of Switzerland which were formerly under the influence of the jurisdiction exercised by the Court of the Imperial Chamber (Reichskammergericht) which Emperor Maximilian I established in 1495 A.D.

§ 4. *The German Civil Code.*

On August 18, 1896, the German Civil Code, together with an Introductory Statute (Einführungsgesetz), was promulgated for the German Empire. It came into force on January 1, 1900. This date marks the final completion of a development that extended over 400 years, and commenced about 1500 A.D. with the reception of Roman law in Germany.

We have already referred to the formal effect of codifications as such (supra, p. 3). In the case of the German Civil Code the effect has been to sweep away, in its entirety, the private law as it has heretofore existed in any part of Germany, whether common or particular private law—the Imperial private law (based on the legislation of the new Empire) alone excepted. The Introductory Statute, however, contains (Article 56 ff.) certain express reservations in favour of the State private law, and to this extent the latter remains in force. Many of the legal rules embodied in the Code are, it is true, borrowed in substance from Roman law; formally, however, the common Pandect law as such has ceased to have the force of law in any part of Germany.

A strong central power was needed to carry through the task of codification. Such a power was found in the new German Empire. The condition of the private law of Germany—represented, as it was, on the one hand, by a motley collection of petty local laws devoid of vital force, and, on the other hand, by a foreign code which, though speaking in a foreign tongue and in many respects obsolete, was nevertheless clothed with statutory authority—stood in urgent need of reform. The separate codifications, so far from removing the difficulties caused by the multiplicity of particular laws, had merely aggravated them. The territories where the private law had been codified were inevitably out of immediate touch with the national jurisprudence, whose energies continued to be devoted to the common law. In order to give formal unity to the private law of Germany, and at the same time to create a body of law, endowed with real vital force and capable, by its inherent strength, of attracting the genius of German scientific research, a *German* Civil Code was required. This, accordingly, was the task which devolved on the new Imperial legislature when the German Empire had at last been re-established.

Early in the sixteenth century Roman law had been received in Germany; four hundred years later—such are the changes wrought by time—it was abolished. But the law of the Pandects, though now dethroned from the commanding position it held so long in Germany, had served a useful purpose. Roman law was, so to speak, the taskmaster under whose discipline the law of modern Germany became what it is. For the transition from Roman civil law to a German civil law, from the reception of Roman law to its supersession, marks a process of steady advance in the inward development of the law of Germany. The German Civil Code did not re-introduce mediaeval German law. The private law contained in the Code is essentially *modern* private law: in it legal conceptions of native growth, dating back to the oldest times, are combined with the results achieved in working out the Pandect law, and with modern ideas on the principles which should regulate human intercourse. The Holy Roman Empire, in its impotence, had to take refuge in the private law of Rome. The new birth of the German Empire has resulted in a new birth of the private law of Germany. After passing through a Roman, a German, and a modern stage, the private law of Germany has emerged at last, enriched by the accumulated forces of its long development, to a new and nobler existence.

§ 5. *The Nature of the Subject to be dealt with.*

Now that the law of the Pandects has been abolished, is the study of Roman private law likely to be discontinued in Germany?

Hitherto the private law of the Romans has been the subject of three different branches of study, viz. (1) the History of Roman Law, (2) the Institutes, and (3) the Pandects.

Between the first two branches—the History of Roman Law and the Institutes—there is a close inner connexion: both were concerned with the history of the private law of Germany, so far as that law is derived from Roman sources.

In the lectures on the History of Roman Law it has been the practice hitherto to set forth the history of Roman law, more particularly of Roman private law, from the oldest times down to Justinian, the author of the Corpus juris civilis (sixth century A.D.). In tracing that history it was shown how Roman law, growing

from small beginnings, took gradual possession of the world, and how, while accomplishing this outward victory, it was inwardly transformed into a great cosmopolitan system of law. It was shown, further, to what causes Roman law and the theory of Roman law owed their greatness, and an explanation was thus given, at the same time, of some of the reasons why Roman law came to be received in Germany.

The 'Institutes*' were closely connected with the History of Roman Law; they were concerned with the ultimate results of the history of Roman private law in so far as that history reached its final stage within the limits of the Roman Empire. In other words, the Institutes were concerned with the private law of Rome as it existed at the time of Justinian. It was reserved for Justinian to sum up the results of the whole development of Roman law. The code in which he accomplished this task is the Corpus juris civilis. It stands at the goal of the history of Roman law, and at the starting-point of the history of mediaeval law. It forms, in a sense, both the coping-stone of the whole structure of antique law and the foundation-stone of the structure of modern law. This is the point of view from which the law of the Corpus juris civilis has hitherto been expounded in the Institutes. The Institutes were concerned with the law of the Corpus juris civilis as it existed at the time of Justinian, in other words, with the law of the Corpus juris civilis in its unaltered form, the so-called pure private law of Rome. To the history of Roman law they added, as its last and noblest achievement, the *theory* of the pure private law of Rome in the finished form in which it is presented to us in the Corpus juris.

On the other hand the Pandects, as a branch of legal study, were immediately concerned with a body of law in actual force in Germany. Both the Institutes and the Pandects (as hitherto expounded) treated of the law of the Corpus juris civilis, but in the case of the Pandects it was the law of the Corpus juris in its modern form, as modified by the Canon law, the customary law of Italy and Germany, and the statutes of the German Empire. The

* The term 'Institutes' is used by German writers to express the modern exposition of the elements of Roman private law as dealt with in the Institutes of Gajus and Justinian, and therefore as corresponding to what in England would be called 'Lectures or Commentaries on the Institutes'.

Pandects set forth the Roman law of the nineteenth century, the Institutes the Roman law of the sixth century. In the Pandects an account was given of the Pandect law in the form in which, till January 1, 1900, it had the force of law within the territory of the Pandect law (supra, p. 5). The books on the Pandects accordingly served a practical purpose: they set forth in a scientific form a body of law actually in force in a large part of Germany, viz. the common private law of Germany, so far as that law was derived from Roman sources.

With the coming into operation of the German Civil Code the law of the Pandects ceased to have the force of law in Germany. It is obvious, therefore, that the Pandects, as a branch of study, ceased as from the same time to serve the practical purpose just mentioned.

It has, however, long been recognized that—apart from its practical utility—the law of the Pandects, as taught and studied in Germany, possesses a special value of its own in the field of pure legal theory.

From the days of the Glossators (infra, § 25 ff.) down to the present time Roman law has engaged the attention of a number of men of the highest intellectual eminence, not only in Germany, but in the whole of Western Europe. The studies of these men were devoted, not merely to ascertaining the positive provisions of Roman law, but also, in an especial degree, to the working out of those general legal conceptions by the aid of which we can master, not Roman law alone, but any other system of law. From the intellectual labours bestowed by jurists on the law of the Pandects for several centuries, jurisprudence has reaped an abundant harvest of legal conceptions which have a scientific value of their own, the importance of the results achieved in this field being, in a large measure, independent of the particular form which the law for the time being in actual force may assume. There are a number of tools, so to speak, which no working jurist can dispense with, and the Pandects were the workshop where these tools of the science of law were manufactured, stored, and carried to ever greater perfection. Thus it came to pass that the study and the teaching of scientific jurisprudence became bound up with the study of the Pandects; and from the time when the school of Bologna stood at the height of its influence down to the present

day, the leadership in the science of law has always fallen to the nation for the time being supreme in the domain of the law of the Pandects.

From the time of Savigny onwards the science of law has reached a higher pitch of perfection in Germany than in any other country, a result which was due, in the first instance, to Savigny himself and, among his successors, in a pre-eminent degree to Jhering. Now the pith and marrow of German legal science is to be found in the Pandects. What then, we may ask, is likely to happen if the study of the Pandects is abandoned? Will the strength of German jurisprudence depart with it?

It is, nevertheless, quite clear that the Pandects cannot continue to hold the place they have hitherto held in the study of law in Germany. Up to the present the study of the Pandects has stood at the very centre of the study of the private law of Germany. Now, the study of the Pandects means the study of *Roman* private law; it means, in other words, that the jurists and the students of Germany have been devoting their best strength to a dead law. Such a state of things cannot be allowed to continue. Science exists for the sake of the living, and it is the business of German science to serve *German* law. What is needed above all things is a science which shall devote all its strength, willingly and unreservedly, to the living, positive law of Germany.

It was natural that German scientific lawyers should take but a distant interest in the development of the modern law of Germany, so long as the existing law offered them no alternative to the received Roman law but a number of 'particular' systems of private law. A Saxon legislature might indeed create a Saxon Civil Code, but it could not create a Saxon legal science. Even Prussia failed to establish an independent legal science of her own, although the territory of the Prussian Landrecht was a comparatively large one. There is, in fact, no such thing as a Saxon or a Prussian legal science. There can only be a German legal science, and its representatives could not be expected to single out any one of the 'particular' systems as the object of their special attention. Accordingly German jurists continued to devote themselves to the law of the Pandects (and of course to German Private Law, in the narrower sense). The only lectures in which the general theory of the private law was scientifically dealt with—and this applied to

the territories in which the private law had been codified as much as to the territory of the common law—were the lectures on the Pandects. In other words, the only genuinely scientific training which practical lawyers received was in the application of a law which, as far as the territories of the codified law were concerned, had no actual existence, and which, as regards even the territory of the common law, had been very largely curtailed in its practical validity by State legislation and—in the most recent times—by Imperial Statutes.

These circumstances will explain the nature of the change which was bound to take place, and which has in fact taken place, in the study of law in Germany. The new German Code marks the decisive turning-point in this development. What distinguishes the Code from the various 'particular' codes is above all things the fact that it is able, by virtue of its greater inherent vitality, to determine the course of German legal science. The living law of modern Germany has at last taken definitive shape as a *national* private law, and it is in the main to this law that the attention of scientific students of the private law will henceforth have to be devoted. A meeting-ground will thus be found on which theory and practice can join hands in a permanent alliance.

It would indeed be strange if centuries of training in Roman law were to profit nothing, and Germans were never to be able to become masters of their own law. Is there really any reason why the art of legal thinking, which has hitherto been acquired and applied with so much success in connexion with the 'phantom of the Pandect law', should not be equally well taught and practised on the materials furnished by the new Civil Code?

The Pandects of Roman law will no longer stand at the centre of the science and the study of the private law of Germany, and their place will be taken by the Pandects of the *German* Corpus juris civilis, that is, by the German Civil Code. The old home of the Pandects will be broken up, but the spirit of scientific inquiry of which the Pandects were the centre will live on, and will find yet ampler scope within the new sphere opened up by the national private law. The future science of the private law of Germany will succeed both to the office hitherto performed by the law of the Pandects and to the wealth of scientific materials which has accumulated round the Pandects. The great training-school of legal

thought will be transferred from the Pandects to the new discipline, with this signal advantage to the student that the intellectual equipment hereafter provided for him will fit him to gauge the full significance, not of a dead law, but of the living law of his country.

The study of Roman private law as such will in future only occupy an introductory stage in the legal curriculum. Pandects of the old kind will disappear, though Pandects in an abbreviated form, dealing with the fundamental principles of the former science, will remain, and will serve, on the one hand, to maintain the existing connexion between legal education and the scientific study of Roman law (which continues to be carried on with unabated vigour) and, on the other hand, to prepare the student for the proper understanding of the contents of the Corpus juris, an explanation of which will be as indispensable to a sound legal training in the future as it has been in the past. The History of Roman Law and the Institutes alone will retain the position they have heretofore occupied in the study of law in Germany. But they will be fused into a single subject, to be called the 'History and System of Roman Private Law', and will be required, in this form, to take over part of the subject-matter previously treated of in the Pandects.

The lectures on the Pandects have, hitherto, served the double purpose of expounding the theory of private law, and, at the same time of introducing the student to the Corpus juris. In future it will be the function of the new 'Pandects' of the German Civil Law to expound the theory of private law, and the task of introducing the student to the Corpus juris will devolve to a considerable extent on the 'History and System of Roman Private Law'.

It is most important that German jurists should remain in touch with the Corpus juris. It furnishes the key without which a complete mastery of the modern law of Germany is impossible. The magnificent results which the skill of the Roman jurists enabled them to achieve are collected and exhibited in this compilation, which is a store-house of legal materials of priceless value. The road to proficiency in legal science lies through a study of the ancient jurists. As an instrument of legal education the Corpus juris is irreplaceable, and as such it should be

jealously preserved (cp. O. Bülow in *Das Recht*, Jahrgang VI, Nos. 16, 17).

It has been customary heretofore to conclude the history of Roman law with an account of Justinian's great code. In future the development of Roman law will have to be traced several stages further. The history of Roman law will have to include an account of the fate of the Corpus juris from the date of its compilation down to the present day—a subject which till now has usually been treated of in the Pandects. It will be necessary to explain the nature of the rôle played by the Corpus juris in the entire subsequent evolution of the law; in other words, the history of Roman law will have to be expounded in such a way as to bring out the value which the Corpus juris possesses even for modern times.

As to the so-called System of Roman Private Law, its function will be to give a compendious survey of the private law contained in the Corpus juris, after the manner hitherto observed in the books on the Institutes—a survey, therefore, into which the historical element will enter to some extent. Certain matters will, indeed, have to be discussed somewhat more fully than has hitherto been the practice in the Institutes, and it will also be advisable, in reference to some points of importance, to travel beyond the Roman law of Justinian and to indicate the connecting-links between the law of the Corpus juris and the modern private law of Germany. In the main, however, the System of Roman Private Law will be concerned with the same private law as has hitherto been expounded in the Institutes: that is, with the *pure* private law of Rome in the form in which Justinian summed up the final results of its previous development. An object of the utmost importance will thus be attained: the preservation of the bond which connects the scientific study of modern law with the contents of the Corpus juris.

In order to accomplish the task thus indicated, it will be advisable to adhere in the main—in this as in other respects—to the principle hitherto observed in Institutional works, and to frame our treatise, on the whole, as an introduction to the study of law, by adapting it to the requirements of beginners. The Corpus juris will stand henceforth only at the threshold of the science of law, and when the student has passed beyond this

stage his attention will be claimed, not by Roman, but by German law.

The plan and purpose of the following treatise are thus explained. We shall premise a few words on the sources of our knowledge of Roman law, and also on the fundamental conceptions of law. We shall then proceed to expound the subject-matter proper, commencing with a brief history of Roman law, and passing on to the doctrinal part, or theory of Roman law.

CHAPTER II

SOURCES AND FUNDAMENTAL CONCEPTIONS

§ 6. *The Sources of Roman Law.*

THE sources of Roman law are of two kinds: first, the Corpus juris civilis of Justinian; and secondly, the pre-Justinian sources of law.

I. THE CORPUS JURIS CIVILIS.

The Corpus juris civilis of Justinian, in its modern form, consists of four parts: the Institutes, Digest, Code, and Novels.

(1) *The Institutes.*

The Institutes (published Nov. 21, 533 A.D.) are a short manual or text-book, the object of which is to give a brief and comprehensive summary of the whole body of law as set forth in the remaining portions of the Corpus juris, and, at the same time, to supply the student with a general introduction to the study of the Corpus juris. It must be observed, however, that this textbook has, in itself, the force of law, the Institutes being published with the same statutory force as the Digest and Code.

The Institutes are divided into four books, each book into titles, each title into paragraphs. The first sentence of each title, preceding § 1, is called 'principium' (pr.). Thus German writers usually quote as follows:—

pr. I. (=Institutionum) de donat. (2, 7).*

Eod. is=eodem titulo; so that § 4 I. eod., closely following another quotation (say, pr. I. de donat. 2, 7), would be a shorter way of writing: § 4 I. de donat. (2, 7), the name and number of the title not being repeated.

h. t. (=hoc titulo) refers to the particular title dealing with the subject-matter in question. Thus, if the subject under discussion were obviously gifts (donationes) pr. I. h. t. would refer to the principium of the title 'de donationibus' (Inst. II. 7). In other words, 'h. t.' refers to the title bearing on the special subject-matter under

* English writers quote briefly as follows: Inst. ii. 7. pr.

discussion; 'eod.' refers to the title given in the quotation immediately preceding.

(2) *The Digest.*

The Digest or Pandects (published Dec. 16, 533 A.D.) are a collection of excerpts or 'fragments' from the writings of the Roman jurists, arranged by Justinian, and endowed by him with statutory force. The Digest contains fifty books, each book being divided into titles, each title into 'fragments' or 'leges', each fragment into a principium and numbered paragraphs. Thus German writers usually quote as follows:—

L. (=lex) 2 pr. D. (=Digestorum) mandati (17, 1).*

L. 10 § 1 eod. (eod. here = D. mandati, 17, 1).

L. 18 h. t. (Here h. t. refers to the title 'mandati', if 'mandatum' or agency is the special subject-matter under discussion.) Books 30, 31, and 32 of the Digest all deal with the same subject, viz. legacies, and are not divided into titles. A quotation thus runs:—

L. 1 D. de legatis I (30).

Some modern writers apply the term 'fragmenta' specifically to the excerpts from the writings of the jurists which make up the titles of the Digest, and therefore quote the Digest briefly as follows:—

fr. 2 pr. mandati (17, 1) (the D. being omitted).

(3) *The Code.*

The Code (published Nov. 16, 534 A.D.) is a collection, by Justinian, of imperial decrees and laws, promulgated partly by the older emperors, partly by Justinian himself, and published (for the most part) in the shape of excerpts. The whole collection was to be regarded as a uniform code with statutory force. It contains twelve books, each book being divided into titles, each title into leges, each lex into paragraphs as above. A quotation would thus run:—

L. 11 § 1 C. (=Codicis) depositi (4, 34).†

The term 'constitutio' (c.) is sometimes applied specifically to the leges of the Code, so that the above quotation would run: c. 11 § 1 depositi (4, 34), (the C. being omitted).

Though published by Justinian at different times, these three

* English writers quote briefly as follows: Dig. 17. 1. 2. pr.

† English writers quote briefly as follows: Cod. 4. 34. 11. 1.

parts of the Corpus juris, viz. the Institutes, Digest, and Code, were intended by him to constitute, in the aggregate, a single code of law with equal statutory force in all its parts. This is the Corpus juris in the form in which it was issued by Justinian. In its modern form, however, the Corpus juris differs from the Corpus juris of Justinian in that it contains a fourth part, viz. the Novels.

(4) *The Novels.*

The Novels are laws enacted by Justinian and some later emperors, subsequently to the completion of the Corpus juris. The great majority of these Novels were issued by Justinian between 535 and 565 A.D. Most of them have been 'received' in Germany. Being later than the Corpus juris, they take precedence, so far as they have been received, over the remaining portions of the Corpus juris. The Novels are quoted by the number, chapter, and paragraph, e.g. Nov. 118, cap. 3, § 1.

Edition of the Corpus juris:

Corpus juris civilis. Editio stereotypa. Institutiones, recensuit P. Krüger. Digesta, rec. Th. Mommsen. Berolini, 1872. Codex Justinianus, rec. P. Krüger. Berol., 1877. Novellae, rec. R. Schöll, G. Kroll. Berol., 1895.

II. The Pre-Justinian Sources of Law are as follows:—

(1) The writings of the Roman jurists in their original form.

(2) The decrees and laws of the Roman emperors in their original form.

(3) The early Roman statutes and other sources of law in their original form, together with documents and incidental information in non-juristic writers.

The following editions are the most important:—

(1) Corpus juris Romani antejustiniani consilio professorum Bonnensium. Bonnae, 1835 ff.

(2) Jurisprudentiae antejustinianae quae supersunt, ed. Huschke, ed. 5. Lipsiae, 1886.

(3) Jurisprudentiae antehadrianae quae supersunt, ed. F. P. Bremer. Pars prior: Liberae reipublicae jurisconsulti. Lipsiae, 1896. Pars altera, sectio prior, 1898; sectio altera, 1901.

(4) Collectio librorum juris antejustiniani. In usum scholarum ediderunt P. Krüger, Th. Mommsen, Guil. Studemund. Tom. I. Gai Institutiones, ed. 3, Berolini, 1891. Tom. II. Ulpiani liber singularis regularum. Pauli libri quinque sententiarum. Fragmenta

minora. Berol., 1878. Tom. III. Fragmenta Vaticana, etc. Berol., 1890.

(5) Corpus legum ab imperatoribus Romanis ante Justinianum latarum, quae extra constitutionum codices supersunt, ed. Hänel. Lips., 1857.

(6) Fontes juris Romani antiqui ed. Bruns., ed. 6. cura Th. Mommseni et O. Gradenwitz. Pars I: Leges et negotia. Pars II: Scriptores. Friburgi in Brisgavia, 1893.

(7) Textes de droit romain, publiés et annotés par P. Girard, 2e éd. Paris, 1895.

APPENDIX.

The Manuscripts of the Corpus Juris.

We are now accustomed to think of the Corpus juris as constituting a single uniform book. Such, however, was not originally the case. Justinian (as we have seen, p. 16 ff.) published the Institutes, Digest, and Code separately as three independent books, though it was his intention that they should represent a uniform body of law. The Novels, of course, were separate and later publications. These facts will explain the form in which the MSS. of the Corpus juris have been handed down to us, each one of which contains but part of the Corpus juris as we now know it.

1. *The Digest.*

The Digest has been preserved to us in a famous and most excellent MS. which was known first as the Pisan, and subsequently as the Florentine MS. During the Middle Ages it was treasured in the city of Pisa, till the Florentines, in the year 1406, conquered that city and removed the precious MS. to Florence.[1] It was written in the beginning of the seventh century by Greek scribes, and corrected with the greatest care, a second original being used for the purpose of emending the text. As far as Western Europe is concerned, it is on this MS. that the history of the Digest, and with it (for the Digest contains the pith of the Corpus juris) the history of Roman law in general, is, in the main, based. It also forms the basis of the numerous 'vulgate' MSS., i. e. MSS. which preserve the text of the Digest as adopted by the Glossators, or teachers of Roman law at Bologna in the twelfth and thirteenth centuries. The vulgates however, unlike the Florentine, never contain more than a portion of the Digest.

According to the plan of study laid down by Justinian for the schools of law, only Books 1–23, 26, 28, and 30 of the Digest were to be the subject-matter of the professorial lectures during the first three years of the course. This will explain why the copy of the Florentine MS., which was at first

[1] A photographic reproduction of this manuscript, prepared by order of the Italian Government, is now in course of publication.

chiefly in use throughout Italy, stopped short at Book 23, or rather Book 24, tit. 2, the first two titles of this book being very closely connected with Book 23. This was called 'Digestum' simply. Books 24, 25, 27, 29, 31–36, however, were to be privately studied in the fourth year. Hence a few, but only very few, of the Italian MSS. are copies of the Florentine from Book 24, tit. 3, to Book 36. The last fourteen books formed no part of the regular curriculum at all, but were reserved for private study at a later period. The Bolognese text was fixed by reference to an incomplete MS. of this second part of the Digest which broke off in the middle of Book 35, tit. 2, lex 82 (ad leg. Falcidiam) before the words 'tres partes'. It was not till the complete Florentine MS. had again become known that the defective MS. of the second part of the Digest could be supplemented and (for the sake of symmetry) brought up to the end of Book 38. Hence this part was given the name of 'Digestum infortiatum' (= fortiatum, 'strengthened'), and was subdivided into the infortiatum proper (up to 'tres partes') and the so-called 'tres partes' (from 'tres partes' to the end of Book 38). The re-discovery of the Florentine MS. also made it possible to make up the third part of the Digest (Book 39 to the end) which came to be known as the 'Digestum novum'. In contradistinction to the Digestum novum, the name of 'Digestum vetus' was applied to that portion of the Digest which had been known long before (Books 1–24, tit. 2). See v. Scheurl, *ZS. für RG.*, vol. xii. p. 143 ff.; Karlowa, *Röm. RG.*, vol. i. (1885) p. 1027 (note). Thus the vulgate MSS. of the Digest consist of three 'volumina', the Digestum vetus (Books 1–24. 2), infortiatum, with the tres partes (Books 24. 3–38), and novum (Books 39–50). These MSS. have little value, because they are in all three parts but copies of the Florentine, the mistakes of which they invariably reproduce. Towards the end of the Digest, for example, the Florentine has two pages placed in the wrong order; all the MSS. referred to have the same mistake. What critical value they possess is due to the fact that, as far at least as Book 33, they contain in several places, as compared with the Florentine MS., certain emendations, additions, and alterations which must have been suggested by a second original at a time when the Digest copies in use only went as far as 'tres partes'. The text given by Mommsen in his great edition of the Digest (Digesta Justiniani Augusti, 2 voll.: 1870) is based on his own critical researches which are laid before us in the same work. He is entitled to the full credit of having elucidated all the above-mentioned facts concerning the MSS. of the Digest.

2. *The Institutes.*

There were very numerous copies of the Institutes, which were much more widely read, even in the early Middle Ages, than the more voluminous Digest. The most valuable MSS. for our purposes are those of Bamberg and Turin, both of the ninth and tenth centuries. The latter (which is unfortunately incomplete) contains an important gloss (the 'Turin gloss on the Institutes') which was written in the time of Justinian.

3. *The Code.*

The Code has been handed down to us in a comparatively incomplete form. This is probably due to its not being prescribed as the subject of

professorial lectures at all, but being left to private industry in the fifth year of study. A Veronese palimpsest (of the same date as the Florentine MS.) was at one time complete, but is now very defective. The remaining MSS. are all based on epitomes of the first nine books of the Code, the last three books being omitted as dealing merely with the public law of the Byzantine Empire. These epitomes, with a few supplements, we possess in MSS. of Pistoja, Paris, and Darmstadt, of the tenth (or eleventh), eleventh, and twelfth centuries respectively. They were gradually completed again by successive writers, beginning with the close of the eleventh century. Towards the end of the twelfth century MSS. of the last three books were written, but the first nine were always regarded as the Code proper, and the 'tres libri', as they were called, have been handed down to us in a separate form. The Greek constitutions, which were left out in all the Western MSS. ('Graeca non leguntur'), were added much later in the prints of the humanist epoch (the sixteenth century) from Byzantine sources both of ecclesiastical and secular law. In the same prints an attempt was made to restore, as far as possible, the inscriptions and subscriptions of the imperial decrees (which had been very much neglected in the vulgate MSS. of the Bolognese school of law) from better manuscripts and also from the Codex Theodosianus.

4. *The Novels.*

The first knowledge that the West obtained of the Novels was derived from the so-called Epitome Juliani, which was a collection of extracts from 125 Novels of Justinian by Julianus, professor of law in Constantinople, A. D. 556. At a later period, the Glossators found another collection of 134 complete Novels, some of which were in the original Latin, while some—and they formed the majority—were in a Latin version (the 'versio vulgata') made from the Greek original. It is probable that this collection is identical with the official one which Justinian ordered to be drawn up for Italy in the year 554 A. D. (Zachariae v. Lingenthal, *Sitzungsberichte der Berliner Akademie*, 1882.) The Glossators called this collection (in contradistinction to the Epitome Juliani) the Authenticum, or Liber Authenticorum (i. e. the 'authentic collection'), and divided the ninety-seven Novels which they considered to be of use into nine collationes and ninety-eight titles. Excerpts from the latter were inserted in the respective passages of the Code, and were called 'authenticae'. In addition to these Western collections there is also a Greek collection of 168 Novels—not all by Justinian however—every one of which is composed in Greek.

Having thus briefly reviewed the state of the MSS., we are now in a position to understand why, in the earliest editions, the Glossators divided the whole Corpus juris into five volumes, with the addition of the glossae. The first three volumes comprised the Digest (vol. 1, Digestum vetus; vol. 2, Digestum infortiatum; vol. 3, Digestum novum), the fourth contained the first nine books of the Code, the fifth (called 'volumen parvum', or 'volumen' simply) the last three books of the Code, the Authenticum, and the Institutes.

The division with which we are now familiar is into four parts in the following order: Institutes, Digest, Code, Novels. This division was first

adopted by Gothofredus in his complete edition of 1583 (without the glossae). He was also the first to give the entire collection the name by which it is now universally known, viz. Corpus juris civilis. It is only from the time of Gothofredus onward that the Corpus juris appears in the now familiar shape of one complete book.

§ 7. *Fundamental Conceptions.*

I. The Conception of Law and the Legal System.[1]

The moral law is the sum of rules which regulate the life of the individual. Law, in the juristic sense, is the sum of rules which regulate the life of a people. In its origin and its character alike, law, in the juristic sense, is essentially social. It embodies that ordered control of the life of a people which is necessary for the preservation of the people and which, for that very reason, is morally binding on the individual. It regulates the relations of power within a people in accordance with the ideal of justice which resides in the community of that people, and the ultimate source of which is the belief in divine justice.[2]

Justice is a principle regulating the distribution of things valued by men—awarding them to some, denying them to others—and it is, at the same time, a principle whereby each man's worth is appraised. Justice gives to 'every one that which is his', that which (in other words) is due to him according to his worth.

[1] Cp. A. Merkel, *Juristische Encyklopädie* (2nd ed., 1900), p. 5 ff.

[2] This is the reason why originally no distinction was made between moral laws and juristic laws. It is only gradually that nations learn to comprehend the special character of the latter. They fail to recognize, at the outset, that the justice realized by laws, in the juristic sense, is necessarily an imperfect *human* justice, in its nature inseparable from definite outward forms; that its realization is sought solely in the interests of a definite outward regulation of the relations of power subsisting between members of a community, and that the purpose for which such laws exist is to strengthen and maintain the national life. It is, therefore, the function, not of juristic, but of moral laws, to produce the moral freedom of the individual; all juristic laws can do is to render such freedom possible. It has been observed that 'the point of view of a "jus quod populus sibi ipse constituit" is still quite foreign to the primitive law of the Aryan nations' (the *dharma* of the Indians, the *θέμις* of the Greeks, the *fas* of the Romans), 'their laws are closely interwoven with their religion and their moral code; they are bound up with the belief in the gods which belongs to the Aryan gentes, the belief, namely, that the gods shield what is right and punish what is wrong.' In later times we have, as opposed to *fas* —law set by the gods—*jus* (Greek *δίκαιον*), or law made by the State (civitas; jus civile). Leist, *Altarisches Jus Gentium* (1889), pp. 3, 4; Leist, *Altarisches Jus Civile*, Part 1 (1892), p. 337 ff., Part 2 (1896), pp. 3 ff., 256, 389 ff.

Divine justice measures a man by his moral worth, his worth before God; human justice measures a man by his legal worth, his worth for the people. Just as the communion between the individual and God is the foundation of moral order, so the mutual communion between the members of a people is the foundation of legal order. In its essence morality points to that which is beyond this world; law, on the other hand, points, in its essence, to the things of this world. It is in the people that legal order has both its source and its objective point.

Law and morality are bound together by strong ties. In order to be healthy, the life of the people as of the individual must ultimately rest on a foundation of morality. It follows that law must be either in accord with, or, at any rate, must not run counter to definite moral requirements. The law, for example, calls upon us to serve the people; and this, one of the foremost demands of the law, is at the same time a demand of morality, which calls upon us to serve our neighbour. On principle therefore every law (in the juristic sense) is not only legally but also morally binding. Nevertheless there is an essential difference between law and morality. It is not the object of law to enforce a minimum of morality. Morality cannot be forced, nor indeed does it admit of being stated in the terms of any formal proposition of general validity. Still less is it the business of law to act as a kind of 'practical Christianity'; Christianity by statute would be a contradiction in terms. It is true, law helps to train men up to Christian morality, but it is not the servant of the moral law; it carries its rules within itself. Law is the servant of the people and of no one else. It exacts the things which are Caesar's—that is, the people's—never the things that are God's.

The principle which lies at the root of law is the self-maintenance of the people. Whatever serves the purpose of preserving the power of a people, that is, humanly speaking, just. Law is the formal expression of the means whereby a people organizes itself for the struggle for existence. Accordingly it is war that generates law. War, it is said, is the father of all things. Under the stress of the perils of war a people consolidates into an army, into a State. So far from being the power that destroys societies, war is the power that builds them up. Legal order has its ultimate origin in military order, and in this sense the soldier is 'pater patriae'.

Military constitutions beget political constitutions, and from the distribution of the booty of war spring the rights of property. Law and the State were born, so to speak, *sub hasta*, under the sign of the spear. All law exists in order that the people may live and be strong, and the power of law over the individual is rooted in that subordination of the individual life to the common life which is demanded by morality. The people claims back from the individual the life which it gave him. Populum vivere necesse est, te vivere non necesse est. Law apportions to each individual that which is due to him as a member of the people, and due to him, moreover, for the sake of the people. Herein lies the true significance of the *suum cuique*, in its legal sense.

The apparent contradiction between what we have said and the division of law itself into two departments—private law and public law—can be readily explained. Rights founded on private law have reference, by their very nature, to the self-interest of the individual, rights founded on public law have reference to the common interests of all. In other words, a private right is enjoyed by the person entitled, primarily, for his own sake, in order namely that he may have power, capacity, scope of action. But a public right—such as the right of a monarch to govern or of a citizen to vote—is enjoyed for the sake of all. Accordingly the effect of a right derived from private law is primarily to confer a power, the effect of a right derived from public law is primarily to impose a duty. This antithesis is not however complete, and the boundary between public and private law has consequently shifted at different times in the history of law and has been variously drawn by legal theorists. We may add that it is on this very question—the question namely as to how the boundary referred to is to be fixed—that the social struggle turns. And though the provisions of private law are primarily designed to serve the self-interest of the individual, nevertheless private law exists no less than public law for the sake of the common good—that is, for the sake of the people—and must accordingly remain subordinate to public law, or may even be said to be, in a sense, subsumed under the latter. On the other hand, private law rests on the gradual recognition of the truth that a people grows strong, not by subordination alone, but, in a yet higher degree, by the development of its members into free persons capable of independent effort and achievement; the truth, in other

words, that legal (or military) order fulfils its real purpose by producing, not military subordination merely, but liberty. It is for the sake of the commonwealth as a whole that each member has assigned to him by law a sphere wherein he may strive for his own interests, wherein his individual energies may be at once satisfied and put forth untrammelled to their utmost capacity. What the individual accomplishes will benefit all. In the primitive ages men are but units of a gregarious crowd: it is the function of private law to transform them into a community of free individuals. In this sense, private law constitutes both the antithesis of the entire body of public law, and, at the same time, its indispensable foundation.

Private law, then, is concerned with rights the essential characteristic of which is that they confer *power* on the person entitled. The objects of rights of this kind—that is, of rights exercised in one's own interest—are, in the first instance, things or the equivalents of things. Private law has accordingly for its subject-matter the rights of control exercised by persons, for their own advantage, over material things. In this sense private law is identical with the law of property. Coupled with the law of property we have the law of the family. The members of a household or family are, like things, subject to a power conferred by private law and therefore exercised in the self-interest of the person in whom it vests. True, they are persons, but in the eye of the law they are persons of lesser value, ranking legally below the head of the household.[3] In the oldest times, the wife and children were actually treated as chattels, and it is suggested with some plausibility that the monogamic power, that is, the sole ownership of a man in his wife—and consequently in his children—represents, in the dawn of history, the earliest application of the principle of exclusive ownership and, with it, the germ of private law. In more developed legal systems the members of the family are treated as persons, and the tendency to regard the family power as existing, not in the interests of the head alone, but of all the members of the household, asserts itself with ever-increasing insistence. Nevertheless a man's house remains in a very real sense his castle, for it represents a sphere of power wherein the

[3] This is the point where the advocates of the so-called 'women's rights movement' join issue. They seek to turn the mistress of the household into a second master. They decline to admit the effect of military order upon the legal organization of the family.

family head may, within certain limits, exercise an authority which is arbitrary, and which, for that very reason, derogates from the complete personality of the other members of the household. The entire history of the law of the family finds expression in the fact that, to this very day, family law and the law of property are treated as constituting together a single great department of the law, viz. Private Law.

In opposition to Private Law (consisting of the Law of Property and Family Law) we have Public Law, which includes Constitutional and Administrative Law together with International Law, Ecclesiastical Law, Criminal Law, and the Law of Procedure. Public Law creates public powers, powers designed for the benefit of the community; it is concerned with rights which enable one person to exercise control, in the common interests of all, over other persons legally his equals.

L. 1 § 2 D. de just. et jure (1, 1) (ULPIAN.): Hujus studii duae sunt positiones, publicum et privatum. Publicum jus est quod ad statum rei Romanae spectat, privatum quod ad singulorum utilitatem: sunt enim quaedam publice utilia, quaedam privatim.

II. The Origin of Law.

Law may originate in one of two ways. First, it may originate in the application of rules of law, that is, it may spring unconsciously from the convictions and life of a people. The law thus begotten is called Customary law. Secondly, it may originate in the conscious creation of rules of law, that is, in the deliberate act of the sovereign power, which act is, in point of form, quite arbitrary. The law thus begotten is called Statute law. Statute law rests on force and owes its formal validity to the command of the sovereign power. Customary law rests on national conviction and owes its validity to the fact that, having sprung from national conviction, it has asserted itself by voluntary observance in virtue of an inward necessity.

L. 32 § 1 D. de leg. (1, 3) (JULIAN.): Inveterata consuetudo pro lege non immerito custoditur, et hoc est jus quod dicitur moribus constitutum. Nam cum ipsae leges nulla alia ex causa nos teneant quam quod judicio populi receptae sunt, merito et ea quae sine ullo scripto populus probavit tenebunt omnes: nam quid interest suffragio populus voluntatem suam declaret an rebus ipsis et factis? Quare rectissimum etiam illud receptum est, ut leges non solum suffragio

legislatoris, sed etiam tacito consensu omnium per desuetudinem abrogentur.

III. The Application of Law.

As regards its territorial limits, the positive law of Germany is either local ('particular') or general ('common'), i. e. it either applies to some part of Germany only (Particularrecht), or it obtains throughout the whole Empire (Gemeines Deutsches Recht).[4] Again, the Common Law of Germany may be either subsidiary, or absolute ('uniform'). It is subsidiary, where it only applies in so far as there is no particular law to the contrary. It is absolute, where it overrides all particular laws that differ from it. The older Common Law of Germany, including the law of the Pandects, had only subsidiary force. The new Common Law of Germany, as created by the acts of the modern imperial legislature, claims absolute validity.

As regards the individual again, a law may be said, in the same way, to be either absolute or subsidiary. A law is subsidiary, or (as it is more usually called) permissive, if its operation can be excluded, in each separate case, by the private will of the individual. The rule of Roman law that the vendor of a thing is answerable for latent defects is a case in point. A law is absolute, if its operation cannot be excluded by the private will of the individual. The rules of law concerning the forms of wills or bills of exchange are cases in point. Most rules of law are absolute. The Romans sometimes use the term 'jus publicum' or 'jus commune', in a technical sense, to express an absolute rule of law, even where such rule is one of private law.

L. 38 D. de pactis (2, 14) (PAPINIAN.): Jus publicum privatorum pactis mutari non potest.

L. 7 § 16 eod. (ULPIAN.): Quoties pactum a jure communi remotum est, servari hoc non oportet.

IV. Law and Right.

German writers distinguish between 'objectives Recht' and 'subjectives Recht'. The former is what we call 'law', or '*a* law'; the latter is what we call a 'right', i. e. a power or authority conferred by law, e. g. the 'right' of a creditor against his debtor.

[4] The law of the Pandects is still called 'Common German Law', because it formerly applied to the whole of Germany.

V. Law and Equity.

Law is described as 'rigid' or 'strict' ('jus strictum'), in so far as it refuses to take into account the particular circumstances of the individual case. For example: jus strictum, as such, declines to consider whether a debtor, in becoming a party to a transaction, was acting under the influence of fraud. Law is described as 'equitable' ('jus aequum'), in so far as it allows the particular circumstances of the individual case to be taken into account. Jus aequum appears frequently in the form of law which is an exception to the ordinary law (the so-called jus singulare), in so far namely as it permits the consideration of special circumstances, *by way of exception*, in certain cases only.[5] Jus singulare is called 'privilege' (in the objective sense) in so far as its benefits affect particular classes of persons. Privilege, in the subjective sense, is a particular right conferred on a definite person by a 'lex specialis'.

L. 14 D. de leg. (1, 3) (PAULUS): Quod vero contra rationem juris receptum est, non est producendum ad consequentias.

§ 8. *Jurisprudence.*

Jurisprudence has a twofold function to perform: first, a practical one; secondly, an ideal one.

I. The Practical Function of Jurisprudence.

The practical function of jurisprudence is to fit the raw material of law for practical use. For the law, as begotten by custom or statute, is but the raw material, and is never otherwise than imperfect and incomplete. Even the wisest of legislators cannot foresee all possible contingencies that may arise. It is the function of jurisprudence to convert the imperfect and incomplete law which it receives at the hands of customs and statutes into a law which shall be complete and free from omissions. In other words, it is its function to transform the raw material into a work of art. A twofold activity is required for the performance of this task: the rules of law must first be ascertained; when ascertained, they must be worked out and unfolded.

In the first place, then, jurisprudence must ascertain what the rules of law are which it receives directly from customs and statutes. This it does by means of Interpretation. Juristic interpretation is

[5] As to the conception of 'jus singulare', cp. Eisele, *Jhering's Jahrbücher für Dogmatik*, vol. xxiii. p. 119 ff.

either 'grammatical' or 'logical'. If it is an interpretation of the letter, i.e. of the words as they stand, it is called 'grammatical'; if it is an interpretation of the sense by reference to the context as well as the origin and object of the rule of law, it is called 'logical'.

In the logical interpretation of a rule of law the element which has to be considered above all others is the *object* of the rule, that is, the practical effect intended by the law-giver.[1] The idea of justice, which is the vital principle of law, requires that the considerations of practical utility inherent in the relations of life shall be taken into account, and where—as is often the case in these relations—the conflicting purposes of opposite parties clash, it happens but too frequently that the extent to which the ideal of justice is realized depends on the amount of force which the practical efforts battling for life are able to command. Law bears thus a double aspect: on the one side it is a reflection of things divine, on the other side a reflection of things human. Jurisprudentia est divinarum atque humanarum rerum notitia, justi atque injusti scientia.[2] He alone can claim to have obtained a real vision of the law, of justice and of injustice, to whom life has revealed itself in its fullness. It is of course true of jurisprudence as it is of other sciences that the knowledge it commands is, and will remain, fragmentary. But it has a lofty aim in view which it must strive, with unremitting endeavour, to approach as nearly as may be. It is the foremost function of the 'logical' interpretation to show clearly the real contents of a rule of law by means of a true perception of its actual conditions and effects; in other words, a logical interpretation should be, above all things, practical, it should

[1] In his work, *Der Zweck im Recht* (vol. i. ed. 2, 1884; vol. ii. 1883), Jhering has made an interesting and ingenious attempt to show that the 'object' aimed at, that is, the consideration of practical utility, is, as he puts it, the 'creator of law'. See also A. Merkel's argument in von Holtzendorff's *Encyklopädie der Rechtswissenschaft* (vol. i. ed. 5, 1890, pp. 13, 14), where Jhering's idea is turned somewhat differently. There is however no real antithesis between justice and practical utility. Whatever is of practical utility to the people, whatever (in other words) is in the common interest *of all*, that is (humanly speaking) just, and conversely (supra, pp. 22, 23) it is 'righteousness' (i.e. justice) that 'exalteth a nation'. The real opposition lies between justice, on the one hand, and the separate interests of an individual or class as such, on the other hand, and it is undoubtedly true that such interests can never be permanently a source of law.

[2] Cp. § 1 Inst. de just. et jure (1, 1); L. 10 § 2 D. de just. et jure (1, 1).

exhibit the *material* significance of the rule, subjecting it to a keen and searching test in its bearings on 'things divine and human'.

Logical and grammatical interpretation must always be combined, the former, in many ways, rectifying the results of a mere interpretation of the letter. When it extends the grammatical interpretation of the words, it is called 'extensive'; when it restricts the grammatical interpretation, it is called 'restrictive' interpretation. To take deliberate advantage of the letter of the law—that is, of its grammatical interpretation—in defiance of its sense—that is, its logical interpretation—would constitute a proceeding 'in fraudem legis'.[3]

L. 17 D. de leg. (1, 3) (CELSUS): Scire leges non hoc est verba earum tenere, sed vim ac potestatem.

L. 29 eod. (PAULUS): Contra legem facit qui id facit quod lex prohibet, in fraudem vero qui, salvis verbis legis, sententiam ejus circumvenit.

Having thus ascertained the rule of law, jurisprudence must next proceed to develop, or work out, its contents. A rule of law may be worked out either by developing the consequences which it involves, or by developing the wider principles which it presupposes. For one rule of law may involve a series of more specific rules of law; it may be a major premiss involving a series of minor premisses. Or again, the given rule of law itself may be the consequence of more general rules; it may be a minor premiss presupposing certain major premisses. The more important of these two methods of procedure is the second, i. e. the method by which, from given rules of law, we ascertain the major premisses which they presuppose. For having ascertained such major premisses, we shall find that they involve, in their logical consequences, a series of other legal rules not directly contained in the sources from which we obtained our rule. The law is thus enriched, and enriched by a purely scientific method. When a given rule of law is so used as to lead us, by an inductive process, to the discovery of a major premiss, the ascertainment of new rules by means of the major premiss thus discovered is termed the 'analogical application' of the given rule of law. The application, then, of a principle (a major premiss) which is *given*, we call the method of Inference;

[3] Cp. J. Pfaff, *Zur Lehre vom sog. in fraudem legis agere*, Vienna, 1892.

the application of a principle which we have *found*, we call the method of Analogy.

The scientific process by means of which principles are discovered which are not immediately contained in the sources of law may be compared to the analytical methods of chemistry. It is in this sense that Jhering has spoken of a 'juristic chemistry'.[4] Jurisprudence analyses a legal relation which is regulated by a rule of law into its elements. It discovers that amidst the whole mass of legal relations that are for ever emerging into new existence from day to day—endless and apparently countless—there are certain elements, comparatively few in number, which are perpetually recurring merely in different combinations. These elements constitute, in the language of Jhering, the 'alphabet of law'.[5] The common element, for instance, in every agreement, whether it be an agreement to purchase, or to hire, or what not, is just *the agreement*, in other words, the expression of consensus. An exhaustive enumeration of the legal rules concerning sales must necessarily include certain rules bearing on this element in every contract of sale, viz. the expression of the concordant will of the parties. Thus from the legal rules concerning sales we gather certain major premisses, or general rules, concerning this element of agreement, which rules will accordingly determine the requirements that are necessary to constitute an agreement: the effect of error, of conditions or other collateral terms, and so forth. They are major premisses involving a countless variety of other legal rules, which will assist us in fixing the conditions under which other agreements—to hire, to deliver, to institute some one heir, and many others—are effectually completed, subject, of course, to such modifications as may be necessitated by a different set of major premisses. Thus, in applying the method of analogy to a rule of law, we are, at the same time, discovering the ingredients of the legal relations. The method of analogy does not mean (as the lay mind is apt to imagine) the application of a given rule of law to a legal relation of a somewhat *similar* kind. Such an analogy would be the very opposite of scientific jurisprudence. It is the application of a given rule, not to a merely similar relation, but to the *identical* relation,

[4] Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwickelung*, Part 3, subdiv. 1 (2nd ed., 1871), p. 11.
[5] *Geist des röm. R.*, Part 1 (3rd ed., 1873), p. 42.

in so far as the *identical* element (to which the given rule had already assigned its proper place) is traceable in a legal relation which is apparently different.

These, then, are the methods by which jurisprudence attains to a full knowledge of the materials of the law, and, filling up the blanks which it finds there, moulds the whole into completeness. The discovery of the elements which recur in every legal relation brings with it the discovery of rules of law which meet the just requirements of every legal relation. The mode of proceeding may be either by Analogy, i. e. by the discovery of those elements and the analysis of legal relations; or by Inference, i. e. by the practical application of those elements and the synthesis of legal relations. It is not by the legislator, but by scientific jurisprudence, that the complexity of human relations is regulated.

II. The Ideal Function of Jurisprudence.

Jurisprudence fulfils its practical function by effecting a material addition to our rules of law, by bringing to light, as it were, the actual *matter* of the law. It fulfils its ideal, its purely scientific function—what one may call its artistic function—by means of the *form* in which it presents these rules of law. For, as in the abundance of matter we are fain to look for the unifying conception which underlies the whole, so in the abundance of legal rules we instinctively search for the one idea which dominates all. It is the ideal task of jurisprudence to satisfy this desire for unity which exists in the mind of man. With this purpose in view, jurisprudence, in expounding the law, will avoid the use of the imperative form; in other words, it will avoid a simple enumeration of legal rules. It prefers to deal, on the one hand, with the facts, or groups of facts, which produce juristic effects; and, on the other hand, with the juristic effects annexed to these facts, or groups of facts, with a view to arranging both facts and effects under definite categories or conceptions, which it defines. A scientific exposition, for example, would never run as follows: If a thing has been delivered to you under a contract of sale, you have a right to keep it, and a third party into whose possession it comes is bound to hand it over to you. The scientific exposition would be in this fashion. First, ownership is a right, unlimited in its contents, to exercise control over a thing. Thus we get the conception of ownership. Secondly, ownership can be acquired by traditio,

occupatio, usucapio, &c. (each of these terms being defined). Thus in place of a series of legal rules we have a number of abstract conceptions, partly of rights, partly of facts. The result of this method of exposition is that the abstract conceptions appear to govern the very rules of law on which, as a matter of fact, they depend, and from which they have been derived. Jurisprudence deduces from the conceptions of ownership, delivery, &c., the several positive rules of law—the identical rules, namely, which it had previously, as it were, put into those conceptions. In point of form, then, the positive character of law is merged in the predominance of abstractions, and jurisprudence proceeds as though it evolved those rules spontaneously from general principles. And it is precisely by this means that the craving of the human mind for unity, and the instinct which shrinks from the predominance of matter, are satisfied.

Each conception, once gained, urges us to rise to still higher ones, and thus the ideal instinct of the science of law begets a desire for a *system of law*, i. e. for a form of representation in which the whole body of law shall come before us as the spontaneous evolution of a single conception, the conception, namely, of *Law*: this done, matter will sink into the background and make way for the victorious Idea.

PART I

THE HISTORY OF ROMAN LAW

INTRODUCTION

§ 9. *The Quiritary Law.*

At the period when Rome first emerges into the light of history the law of the city had already completed a long course of development. The traditions concerning the pre-historic stage of Roman law are indeed of the scantiest, but, such as they are, we should try at least to make them yield to us a picture, however imperfect, of the character of this primitive development, and, in so doing, to form some idea of the nature of the soil from which the authentic portion of the history of Roman law has sprung.[1]

The pre-historic stage in the development of the Roman State and of Roman law coincides with the period of the kings. The Roman State in the regal period was a State of clans. With the Romans as with other peoples the clan (gens) was the primary cell from which the State was evolved. Beside the king as chieftain we find a council consisting of the elders of the clans,[2] the senatus, and the entire body of all the members of the clans, the populus.

An individual as such could not belong immediately to the State. In order to belong to the State, he had first to belong to one of the clans or gentes that composed the State. A group of

[1] Among those whose labours have contributed to our knowledge of Roman constitutional and legal history special mention should be made of Mommsen (*Römisches Staatsrecht*, 3rd ed., 3 vols., 1887; *Abriss des röm. Staatsrechts*, in Binding's *Handbuch*, 1893) and Jhering (*Geist des röm. Rechts auf den verschiedenen Stufen seiner Entwickelung*, 5th ed., 3 vols., 1891). An exhaustive account of Roman legal history has been commenced by Karlowa, *Röm. RG.*, vols. i, ii, parts 1, 2, 1885 ff. See also M. Voigt, *Röm. RG.*, 3 vols., 1892–1902. Schulin's *Lehrbuch der Geschichte des röm. Rechts*, 1889, is a short textbook on the subject.

[2] Every member of the ancient patrician Senate was 'in theory a king' and 'could actually officiate as such',—as interrex, namely (Mommsen, *Abriss*, p. 306). The kingship itself obviously grew out of the position occupied by the senior member of a clan.

gentes constituted together a *curia*, ten curiae formed a 'third', or *tribus*, and the three 'thirds'—Ramnes, Titienses, Luceres—formed the State. In the structure of the State the curia was the smallest recognized unit: the liability to military service was regulated by curiae—each curia being bound, on principle, to furnish one centuria for infantry service and one decuria for cavalry service—and it was by curiae that the voting took place (in the comitia curiata). Within the curia the gens had no existence as a political unit. On the other hand, no one could be a member of a curia (that is, a 'quiris'), and therefore a citizen, unless he was a 'gentilis', or member of a clan. Civic, or quiritary, rights could only be enjoyed through the medium of gentile rights. There was accordingly only one way—apart from the admission of individuals to an existing clan—whereby the number of citizens could be enlarged, and that was by admitting new clans—the so-called 'younger clans', gentes minores—to the curiae. The individual as such was incapable of political rights or duties. It was only through the medium of his clan that the capacity for such rights and duties could be acquired.

With the development of the State the gens ceased to play any part as a political corporation. The growth of the State involved—and necessarily involved, by the very nature of the process—the break-up of the political cohesion of the gens. But in economic as in religious matters the bond of unity which had held the clan together before the State came into being remained in full force during the period of the kings. The arable portions of the land of the community (the 'ager privatus') were not assigned to individuals, but to gentes. Individual property in land was unknown. The very house and garden (hortus) of the clansman, though allotted to him in permanence, were not held by him as owner, but remained in the common ownership of the gens—a 'heredium', or homestead, which he had no power to alienate.[3] As at one time with the Germans, so with the ancient Romans, the husbandry of the individual was a constituent part of the

[3] It is in this same sense that the term 'terra salica' occurs in the later texts of the Lex Salica, in the sense namely of 'folkland' permanently assigned in user to individuals (cp. *Berichte der königl. sächsischen Gesellschaft d. Wissenschaften, phil.-hist. Klasse*, 1896, p. 164 ff.). The same thing is to be found, about the same time, in the Lex Ribuaria under the name of 'hereditas aviatica', or 'hereditary land'.

common husbandry of the clan. Free rights in severalty could only be enjoyed by the individual in respect of that which he had 'in his hand', 'in manu'; that is to say—apart from his wife (uxor in manu)[4] and children—in respect only of things capable of 'mancipium', things that could be 'taken with the hand', viz. slaves (mancipia) and cattle (pecunia). Now, it was only movables that could be thus 'taken with the hand'. Originally, therefore, only movables ranked as res mancipii (infra, § 59 III), as objects of complete ownership; they alone, in other words, could be held by individuals as separate property. But even in regard to movables separate property can be traced back to common property as its source. In the earliest times all property, movable as well as immovable, was the common property of the gens, and it is on this primitive fact that the supplementary right of the gens to succeed to the inheritance of a deceased person—in default namely of agnates—was based, a right which continued to be recognized down to the early Empire (infra, § 111).[5] The management and cultivation of property is carried on, in the oldest times, on behalf of the gens; it is the gens alone that *owns*; all property whatsoever is on principle the collective property of the gentiles. Each member of the clan at this stage enjoys rights of property, just as he enjoys political rights, by virtue of his clanship alone. The individual, standing by himself, counts for nothing. Whatever he is, he is, politically or economically speaking, *through* his family, or rather through his gens, which is his collective family. For even the separate family can only exist under the protection of the gens—as a branch, so to speak, of the gentile tree. The gens alone lives, not the individual.

There can be no doubt that the economic significance of the gentile organization had a decisive influence on its political effects. A clansman enjoyed *political* rights through his clanship just because it was through his clanship that he enjoyed rights of property. Private law furnishes the foundation upon which public law rests.

[4] See infra, § 92, and supra, p. 25. The German 'munt' (e. g. in 'Vormundschaft') corresponds linguistically and in substance to the Latin 'manus'. Munt means 'hand' and is the oldest German expression for individual ownership. Cp. A. Heusler, *Institutionen des deutschen Privatrechts*, vol. i. p. 95 ff. M. Voigt, *Röm. RG.*, vol. i. p. 348 ff. C. Tunzelmann v. Adlerflug, *Zum Wesen der langobardischen Munt*, Inauguraldissert., Freiburg im Breisgau, 1897, p. 31 ff.

[5] On this subject, see Mommsen, *Röm. Staatsrecht*, vol. iii. p. 23 ff.

As early as the regal period, however, the gentile system in Rome was deprived of its economic importance through the development of the principle of separate private property. The upshot of the development was that the Roman State ceased to be a State of clans.

The decisive factor in this process was the extension of the notion of separate ownership from movables to land. Among primitive communities land is the seat of economic power. The principle of private property was applied, in the first instance, to town land, to the clansman's house and garden within the city. The arable fields followed next. The rights of the clan in the arable land were broken up and distributed among the individual holders. The only traces of the former collective ownership which survived in later times are to be found in the law of succession and in the law of guardianship, which latter is closely bound up with the law of succession. Land became a 'res mancipii', a thing that 'could be taken with the hand'. For purposes of private law it was treated as a movable and, as such, was added to the category of things that could be held in free individual ownership.

Tradition assigns the decisive turning-point in this development to the reign of Servius Tullius.[6] It is however evident that the so-called Servian Constitution merely gave expression and effect to the final results of conditions which had actually been established for a great many years. That such was the case is shown most clearly by the fact that the rise of the institution of private property in land was most intimately associated with another development, the rise, namely, of the estate of free plebeians—a development which, as usual, matured but by slow degrees.

From the oldest times the Roman community had comprised, besides the class of freemen, a body of unfree men (servi). An unfree man, as such, was not a person, but a thing. He was

[6] It is to Servius Tullius that the division of the city of Rome into four local tribes is attributed. The four city tribes were afterwards followed by the creation of sixteen country tribes (cp. infra, p. 40, n. 11). The local tribe marks the sphere of individual property. The break-up of the common rights of the gens within the city finds expression in the creation of the city tribes; the creation of the country tribes means that the arable land previously held by gentes has been divided among individuals. Cp. Mommsen, *Röm. Staatsrecht*, vol. iii. p. 162 ff. K. J. Neumann (*Die Grundherrschaft der römischen Republik*, 1900) assigns the creation of the country tribes and the consequential 'emancipation of the peasants' to the year 457 B. C. Ed. Meyer, vol. xxx. (1895) of the *Hermes* (p. 17), attributes the establishment of the country tribes to the Decemviri.

entirely debarred from private as well as from political rights. But an unfree man was always potentially a free man. In ancient Rome the legal road to freedom lay through the relation called *clientela*. Clientes, or vassals, were such unfree men as were not, in fact, treated in the household as things—in other words, as servi—but as 'liberi', or children of the family. Legally speaking, being unfree, they were not 'father's sons', *patricii*, nor could they be 'fathers' (patres) in the legal sense. As a matter of fact however they stood on a level with the free members of the household. They were attached to a member of one of the gentes as men 'who hearkened' (clientes), and were reckoned as belonging to his gens and curia, not however as free associates, but only as dependants. Still the fact that they were thus brought into connexion—though only into passive connexion—with the gentile organization, necessarily brought them into connexion—though again only into passive connexion—with the Roman State. This connexion contained at any rate the germ of a future liberty. The further development of the institution of clientela was mainly and most materially influenced by the practice of admitting entire bodies of citizens of conquered towns within the pale of the Roman community. Since these new-comers, who were men of kindred race, could not be received on a footing of equality, nor again as slaves, the only course left was to rank them as clientes. Nominally they were attached as vassals to some patrician. As a matter of fact they were free. They kept, and were intended to keep, their own property. They kept their own marriages and their own separate families. But they were, of course, precluded from forming a gens of their own,[7] for the simple reason that they already belonged to one or other of the patrician gentes, though indeed only as dependent members.[8] In the eye of the law, consequently, as they had no independent personality of their own, they could not, in the first instance, possess their goods, or their wives and children, directly, but only, like the clientes, indirectly, through the medium of the patrician clansman to whom they were attached as patron. But since they were admitted in large bodies at a time and were left in

[7] The strict legal term for the plebeian 'gentes' was 'stirpes', not gentes. They were not gentes in the legal sense. Mommsen, *op. cit.*, vol. iii. p. 74.

[8] The right of the plebeians to vote in the curiae is of later origin. Mommsen, *op. cit.*, pp. 92, 93.

actual enjoyment of their liberty, their connexion with the patron and, through him, with the gens, was a mere fiction. As a matter of fact these dependants took their place in the legal system of Rome as *clan-less* people, in a word, as individuals. The far-reaching importance of this fact cannot be exaggerated. It marks a rupture with the traditional legal ideas of Rome. Of course the change was not effected at one blow. Such a proceeding would have been foreign to the Roman character. The complete working-out of the new legal idea involved a struggle which occupies the entire first epoch of the development of Roman law, an epoch which is in the main pre-historic. It was the struggle at the memorable close of which Roman law and the Roman State stood ready to take up their great rôle in the history of the world.

The result of the practice of admitting the populations of conquered towns as clientes within the pale of the Roman community was that, after a time, the clientes formed numerically the bulk of the inhabitants of Rome. They were the 'multitude', the 'plebes', as contrasted with the gentes, the patrician 'populus'. Their strength lay in their numbers. Only a fraction of the clientes actually remained in the legal condition of clientela. With the great majority, clientela was but a half-way house on the road to *legal* freedom, that is, to the freedom enjoyed by the 'plebeians'.[9]

It was within the sphere of private law that the plebeians were first allowed to have *legal* rights. Their property—movable property alone was in question at first—was recognized as belonging to them by legal title; their marriages were recognized as lawful marriages. We have no documentary evidence at all to show how this development—one of the most momentous of ancient times—came about. The change was probably due to an unconscious transformation of the legal convictions of the people finding expression in their actual habits and practice. The greatest and most far-reaching revolutions in history are not consciously observed at the time of their occurrence.

In ancient law the capacity to have rights within the private law is a constituent part of a man's general capacity as a citizen. A citizen alone is legally a person. To allow therefore that a plebeian could have private rights was to allow that he was *pro tanto* a citizen.

[9] On this topic the results established by Mommsen's researches (*op. cit.*, p. 55 ff.) are of fundamental importance.

He had become capable of holding property by quiritary title, by the title of a Roman citizen; he could contract a lawful marriage, that is, a marriage of the kind contracted by Roman citizens. Thus the great reform had been accomplished as far as private law was concerned. The plebeian and the patrician now ranked legally as equals. The plebeians accordingly participated in that development which led in Rome to the recognition of separate quiritary ownership in land. Indeed the victory of the principle of private property and the rise of the plebeian order were closely connected with one another. Whatever a plebeian owned, he owned, as a matter of fact, from the outset independently of the gentile organization; his ownership was in reality all along the ownership of a clan-less man, in a word, it was individual ownership. The conception of free individual property sprang from the ranks of the plebeians, and it was this very conception that destroyed the gentile organization of the ancient families. When the land in the country —which technically the plebeians had perhaps at first only occupied *precario*—was divided up, the benefits of the change affected the plebeians as well as the patricians, indeed they would seem to have affected the plebeians more particularly.[10] And it is this fact that finds expression in the 'Servian' constitution.

We have seen that, for economic purposes, the old gentile system had been broken up. It was merely a question of time when it would cease to have any connexion with the structure of the State. Servius Tullius is reported to have further signalized the formal recognition of private individual property in land[11] by making the ownership of land the new foundation of his military and fiscal arrangements. The plebeians had become sharers in the property of the nation. It was right therefore that they should be required henceforth to render the military service and pay the taxes due from them as citizens. The duty to serve in the army and to pay taxes was annexed to the ownership of land. For purposes of infantry service the whole body of citizens was divided into five classes according to the amount of land they owned; each class was liable to military service in a fixed number of sub-divisions called

[10] Cp. Weber, *Röm. Agrargeschichte*, 1891, pp. 117–18.

[11] It is most probable that at this time the division of the town land had already taken place; the division of the land in the country, in other words, the establishment of the local country tribes, was in preparation. Cp. Mommsen, *op. cit.*, p. 244, and supra, p. 37, n. 6.

centuriae.[12] Service in the cavalry centuriae was subject to special regulations. The cavalry centuriae were permanently under arms. The infantry centuriae consisted, as such, not of actual levies, but of persons liable to be levied. As regards taxation, on the other hand, the division of the ager privatus into local tribes (supra, p. 37, note 6) was used as a basis for the new arrangements.

The reform of the rules of military service and taxation was necessarily followed by a reform of the franchise. It was towards the beginning of the Republic at latest that the citizen army, in its newly organized form, became the governing populus Romanus. The voting took place by centuries. The eighteen centuries of the cavalry voted first, then followed the five divisions of the infantry in due order, the first division—the 'classici'—in eighty centuries, the remaining four divisions together in ninety centuries. The cavalry and the first division (i.e. the class owning the largest number of jugera) were sufficient, if they voted together, to form a majority.[13] The preponderant influence of land was thus transferred from the economic to the political sphere.

In the exercise of the sovereign powers of the Roman community —except as regards the regulation of certain questions of gentile law[14]—the comitia curiata were now superseded by the new comitia, the comitia centuriata. This fact marks the great turning-point in the development.[15] A new community had come into existence, a populus Romanus consisting of patricians *and plebeians*. The plebeians had thus succeeded in obtaining a recognition of their capacity in regard to public as well as to private law. As distinguished from the plebeians, the patricians merely represented henceforth a noble caste enjoying certain privileges the real foundations of which had disappeared. It was only a question of time

[12] The first division of the infantry was called 'classis', simply; it represented the real 'line' of the phalanx. The term 'classis' was subsequently extended to the four lower divisions, the total number of classes being reckoned as five. Mommsen, *ibid.*, p. 263.

[13] As to the subsequent development of the organization of the comitia centuriata, and of the laws dealing with military service and taxation, v. Mommsen, *op. cit.*, vol. iii. p. 247 ff.

[14] For example, if an independent male citizen wished to pass by adrogatio (infra, § 100) into another gens; Mommsen, *ibid.*, p. 318 ff.

[15] The comitia tributa—which existed in the first instance side by side with the comitia centuriata, but as comitia of lesser legal authority (comitia leviora)—did not embody any new and fruitful idea of fundamental importance; Mommsen, *ibid.*, p. 322 ff.

when the last remnants of the ancient class distinctions would be swept away, though the two final stages in the development—the concession of connubium with the patricians (involving a recognition of equality of birth as between the two orders), and the acknowledgement of the plebeians' equal rights to public and sacerdotal offices—were not reached till after the Twelve Tables.[16] The multitude rose from vassalage to full freedom. The strength of the Roman body politic dates from this time, and Roman law was ready to set out on its great historic career.

The regal period ends with the break-up of the State of clans and, at the same time, with the new birth of the populus Romanus on a broader basis. The citizen of the new State was called *civis*. He superseded the older type of citizen, the *quiris*, or member of a curia. In place of a quiritary law we have a civil law, that is, a law for the individual civis as such, whose liberty has its foundation, not, as before, in clanship, but simply in membership of the State (civitas). It is the development of the Roman *civil* law that gives to the history of Roman law its special character and its permanent importance.

§ 10. *The Development of the Civil Law in its Principal Stages.*

Two features characterize the pre-historic stage in the development of Roman law which we have just described.

In the first place, there is the preponderant influence of landed property. The old common ownership of the gentes in the land was the basis of the gentile organization. When the land was divided, the gentile organization disappeared, but only to make way for another system, founded, like it, on landed property.

In the second place, we cannot fail to be struck by the energy with which the idea of individual landed property was carried through at, comparatively speaking, so early a stage, and by the rapidity with which the consequences involved in the idea were realized. For the development of free private property in land (as

[16] The Lex Canuleja of the year 309 A.U.C. (445 B.C.) gave the plebeians connubium with the patricians. In 387 A.U.C. (367 B.C.) the Lex Licinia enacted that one of the consuls must be a plebeian. The tribuni plebis—whose office was perhaps a very ancient one, though the right of intercession was not bestowed on them till the year 260 A.U.C. (494 B.C.) as a result of the first secessio—were not, as such, magistratus populi Romani.

in movables)—from its beginnings down to its final completion—falls entirely within the regal period, in other words, it was finished before the authentic history of Rome even commences. German law adhered, during its whole development right down to the close of the Middle Ages, in the main to restricted forms of landed property, viz. collective ownership, feudal and other kinds of tenure. The history of Roman law, on the other hand, starts at once, from the moment the authentic tradition begins, with free private property in land as in movables, and this conception of the freedom of ownership becomes henceforth the guiding principle in the entire development of Roman private law.

It is readily perceived that the remarkably early victory of the principle of free ownership in Rome was due to the conditions of town life. From the very outset the city (urbs) stood in the centre of Roman history, legal as well as political. The city is the birthplace of commerce,[1] and commerce demands free rights of property. It is the city again that begets the multitude, the compact body of persons living close together, and the effect of a multitude is to wear away the gentile bond and to leave the field free for the individual. A community of clans thus makes way for a community of persons belonging to the same locality. Throughout the Middle Ages German law remained primarily a law for the country. The distinctive feature of Roman law is that when it first appears on the stage of history it is already a city law. Almost throughout the Middle Ages, again, German law received its decisive impulses from the peasantry and the nobility; Roman law, on the other hand, tended from the very outset to become a law for a city and for citizens.

In the history of the Roman civil law we observe two stages of development.

During the first period Rome is a State of peasant-citizens.[2] We have seen how the fusion of patricians and plebeians produced a new type of commonwealth, but the citizens of this commonwealth had not, as yet, shaken off the associations of their earlier rural life;

[1] In Rome as elsewhere the commercial interests were quick to assert themselves, Mommsen, *Röm. Geschichte*, 8th ed., vol. i. p. 46 ff. (Dickson's Translation, vol. i. p. 56; 1894). The ancient patricians represented a class of 'great landed proprietors engaged in commerce on a large scale', M. Weber, *Röm. Agrargeschichte*, p. 116.

[2] Cp. M. Weber, *op. cit.*, p. 117.

they still breathed the strength that comes of contact with the earth. A man's worth and duties as a Roman citizen were alike measured by the land he owned. It was the freehold that made the man. In the comitia centuriata the preponderance of power lay, as we have seen (p. 41), with the classici, the largest owners of land. Afterwards, when the Roman plebeian had succeeded in securing a recognition of his right to hold his house and his field in free separate ownership, the rights in the ager publicus, the common land—it was originally pasture land—became the principal object of his economic and political interests. The struggle for the enlargement and, at the same time, for the distribution of the ager publicus, occupies nearly the entire period of the Republic.

The Roman peasant-citizen embodies the true type of the genuine Roman burgher. The civil law of this period bore a distinctively national Roman (i. e. Latin) character. It was rigid, cumbrous, punctilious in form, and of juristic acts it had but few to show. True, it was already a law for citizens, a law based on freedom of property and freedom of intercourse, but, for all that, it bore clear traces, in its narrowness and its limitations, of the old-world peasant notions of an earlier age. The Roman law of this period was a city law, a law adapted to the requirements of a community circumscribed and determined by its national character; but it was the city law of a peasant community, and its essence lay in the *jus strictum*, the rigid law of an age when commerce moved but slowly.

As a result of Rome's political successes the range of the Roman community was enlarged. Towards the close of the Republic the Roman franchise had been extended over the whole of Italy, and the soil of Italy had become Roman ager privatus. At the same time Rome became the centre of the world's government and the world's trade.

The Punic Wars had decided the struggle for supremacy in the world in favour of the Romans. The close of the wars marks the commencement of the second period in Roman history and Roman law.

The ravages of the war with Hannibal broke the back of the Italian peasantry. Rome ceased henceforth to be a nation of peasant-citizens. The great Carthaginian was vanquished, but in succumbing he dealt a mortal wound to the national life of Rome, and the young Empire which arose over the ruins of Carthage bore

the seeds of its own destruction within it. The class of small land-owners disappeared. A larger type of citizen survived, the type represented by the proprietors of the great *latifundia* and the great merchants, the class who, with their troops of slaves, crushed the free labour and, with it, the freedom of the masses. The system of *latifundia* spread from Italy all over the Roman Empire, carrying serfdom with it wherever it went. By the end of the third century of our era the small farmer had ceased to be the free tenant of the great landowner, and had sunk to the position of an hereditary vassal tied to the soil, a 'colonus'.[3] The labour of the freeman had passed under the control of the great landlord. While Rome's serfs were growing into freemen, her power was steadily in the ascendant; when the mass of her small freemen lapsed into serfdom, her power was doomed. Christianity came to proclaim the gospel to the masses, but it arrived too late to effect any decisive reform in the existing economic conditions. The Roman Empire fell a prey to the barbarians.

The decay of the Roman State set in at the very time when the foundations of Rome's supremacy were laid. At the same time, however, Roman law (and more particularly Roman private law) reached the culminating point of its development. The great capitalist and land-owning class became the agents of a world-wide commerce which in its energy and in regard to the part played by money in its economic development reminds us of our own times.[4]

[3] Our knowledge of the facts concerning the great landed estates of the Empire has been considerably enlarged in recent times by the labours of Ad. Schulten (*Die römischen Grundherrschaften*, 1896), Rud. His (*Die Domänen der römischen Kaiserzeit*, 1896), Ed. Beaudouin (*Les grands domaines dans l'Empire Romain*, 1898), and Mitteis (*Zur Geschichte der Erbpacht*, infra, § 70, n. 2). See also the next note.

[4] Cp. Goldschmidt's *Handbuch des Handelsrechts*, 3rd ed., vol. i. 1891, p. 65 ff.; Ed. Meyer, in *Conrad's Jahrbuch f. Nationalökonomie*, 1895, p. 696 ff.; Bücher, *Entstehung der Volkswirtschaft*, 2nd ed., 1898, p. 65 ff. (where Ed. Meyer's views are controverted); Mitteis, *Aus den griechischen Papyrusurkunden*, 1900, p. 24 ff.—From the fourth century onwards a retrograde movement set in, and the economic condition of the Empire tended more and more to establish itself on a basis of exchange in kind (Mitteis, *op. cit.*, p. 26 ff.). The commercial growth of the Roman Empire never reached the necessary degree of maturity to enable it to carry the money system to its full development. From the close of the third century the great landowners, who ruled the land, began to cut themselves off from the towns and to produce for themselves, each household becoming economically self-sufficient. The result was to paralyse the strength of the towns, and with it the strength of the Empire. When the Western Empire dissolved, it handed over to its successors in the Middle Ages an economic system founded on exchange in

Rome was no longer the country town of old. It had become the meeting-place of the nations of the earth who carried their treasures to her markets. And while commerce was levelling the national distinctions, Greek culture was spreading over all parts of the civilized world. The peasant-citizen was being transformed into the world-citizen, and, as a necessary consequence, the law of the peasant-state was broadening into a cosmopolitan system. The lines on which the development of the civil law actually proceeded are thus indicated. The jus civile, the law for Roman citizens, as it had been transmitted from the past, underwent a gradual transformation and tended to approximate more and more to that other body of law which had matured alongside of the jus civile: the jus gentium, the law regulating the dealings with foreigners—a law which combined simplicity in the requirements of form with a surprising comprehensiveness in regard to the matters brought within its range; a law in which the claims of equity and the conceptions of honour and good faith (without which no developed system of commerce is possible) were given free play and were yet brought within the operation of definite rules. Towards the commencement of the third century (in the reign of Caracalla) the Roman franchise was extended to the great bulk of the subjects of the Empire (infra, pp. 114, 174, 175). In point of form, the Roman civil law was still only applicable to Roman citizens. But to be a citizen of Rome was now to be a citizen of a world-wide Empire. The Roman civil law—at one time a narrow kind of private law, circumscribed and limited by national idiosyncrasies—expanded into a private law for the citizen of the *orbis terrarum*, a law for the private person as such, a law, in other words, in which the essential and indestructible elements of the private personality found expression. And at the same time the rules regulating the ordinary dealings between man and man widened into a system in which the essential character of such dealings was brought out, a system not restricted to the dealings of any particular age, but applicable in all ages alike. Herein lay the secret of the imperishable strength of Roman private law. Roman citizenship of the specifically national type had to pass away in order that its mighty offspring,

kind and dominated by the great landed interest—a system which was not superseded till centuries later by the rise and growing influence of the towns.

the cosmopolitan system of Roman private law, might come into being. Roman law still continued to be called 'civil law': as a matter of fact it had ceased to be the local law of a city and had become the universal law of a world-wide empire.

The history of Roman law accordingly divides itself into two great periods: (1) the Period of Local Law, which extends down to the last century of the Republic; (2) the Period of Universal Law, which is the period of the Empire. The first period is marked by the prevalence of the jus civile of the old type, which is the rigid, formal, national (i. e. Latin) law of Rome. The second period is marked by the prevalence of what was to be the jus civile of the future, i. e. the equitable law, free from formalism, which sprang from the world-commerce—the jus gentium—and the mutual interaction of Greek and Roman influences.

CHAPTER I

ROMAN LAW AS THE LAW OF THE CITY OF ROME

§ 11. *The Twelve Tables.*

THE law of the city of Rome was called, very appropriately, 'jus civile,' or the 'law for citizens'; it applied exclusively to the citizens of the Roman city-state. This law was set forth, for the first time, on a larger scale, in the legislation of the Twelve Tables, B.C. 451, 450 (A.U.C. 303, 304).[1] The Twelve Tables mark, at the same time, the starting-point in the development of Roman law, so far as it can be historically authenticated, a development which, after steadily advancing in uninterrupted progression, finally culminated in the Corpus juris civilis of Justinian.

The characteristics of early Roman law, as we find it, or suppose it to have existed, in the Twelve Tables, are formalism and rigidity.

All private dealings between man and man are, at this time, governed by two juristic acts: (1) 'mancipatio' (or 'mancipium', in the old language); (2) 'nexum.'

1. Mancipatio.

Mancipatio is the solemn sale per aes et libram.[2] In the presence of five witnesses (cives Romani puberes) a skilled weigh-master (libripens) weighs out to the vendor a certain amount of uncoined copper (aes, raudus, rauducsculum) which is the purchase-money, and the purchaser, with solemn words, takes possession with his hand—hence the description of the act as 'hand-grasp'—of the thing purchased as being his property.

GAJUS, Inst. I. § 119: Est autem mancipatio . . . imaginaria quaedam venditio, quod et ipsum jus proprium civium Romanorum

[1] The authenticity of the Twelve Tables has recently been challenged by Pais, *Storia di Roma*, vol. i. (Torino, 1898-99), and Lambert, *La question de l'authenticité des XII Tables* (Paris, 1902). The views of these writers have, however, been controverted by Girard who, in the *Nouvelle revue historique de droit*, 1902 (July and August number), successfully establishes the authenticity of the Tables. Cp. Erman's interesting report in the *ZS. d. Sav. St.*, vol. xxiii. p. 450 ff.

[2] Bechmann, *Der Kauf nach gemeinem Recht*, vol. i. (1876), and, in reference to it, Degenkolb in vol. xx. (p. 481 ff.) of the *Krit. Vierteljahrsschrift.*

est. Eaque res ita agitur: adhibitis non minus quam quinque testibus civibus Romanis puberibus et praeterea alio ejusdem condicionis qui libram aeneam teneat, qui appellatur libripens, is qui mancipio accipit aes tenens ita dicit: HUNC EGO HOMINEM EX JURE QUIRITIUM MEUM ESSE AJO ISQUE MIHI EMPTUS ESTO HOC AERE AENEAQUE LIBRA; deinde aere percutit libram idque aes dat ei a quo mancipio accipit, quasi pretii loco.

Before the Twelve Tables, when there was as yet no coined money, the weighing out of the aes by the libripens constituted or, at any rate, might constitute the actual payment of the purchase-money. Mancipatio was not an 'imaginaria venditio', but a genuine sale. But the decemviri introduced coined money into Rome. The first coin used was the copper 'as', the silver denarius not being introduced till 269 B. C. These changes however did not affect the formalism of mancipatio. The libripens and the weighing still remained, in spite of the fact that the weighing out of uncoined aes had ceased to constitute payment. For the payment implied in the ceremonial of mancipatio was now a purely fictitious one, and the actual payment was a matter quite independent of the mancipatio. Hence the enactment of the Twelve Tables that no mancipatio should be legally operative unless the price were actually paid or, at least, security were given for it.[2a] Thus mancipatio continued to be a real sale, and on principle it was a sale for ready money, a narrowly circumscribed transaction clothed in rigid formalities and only available for a single economic purpose. The mancipatory sale was the only valid form of sale which was known, and was thus at the same time the only private juristic act by which, at this stage of the jus civile, property could be conveyed. No alienation of property, therefore, was legally valid unless it satisfied the following conditions: it must be for valuable consideration; it must be carried out in the presence of five witnesses

[2a] Cp. § 41 I. de rer. div. (2, 1): Venditae vero et traditae (res) non aliter emptori adquiruntur quam si is venditori pretium solverit vel alio modo ei satisfecerit, veluti expromissore vel pignore dato. Quod cavetur quidem etiam *lege duodecim tabularum*.—It seems certain that the text which the framers of this passage in the Institutes had before them, contained the words: venditae vero et *mancipatae* (not traditae) res. It was only in the course of the subsequent development that this rule was extended to res venditae et traditae (infra, p. 69). It must still remain a moot point whether the giving of security for the price (by vadimonium or sponsio, infra, § 80, note 3) was really put on the same footing as the actual payment thereof as early as the Twelve Tables.

and the libripens; the thing to be alienated must be before the parties, and only so many things can be alienated in any one transaction as the purchaser can take hold of (manu capere) at one and the same time. Thus if more things are to be mancipated than the alienee can take hold of at once, the whole ceremony of mancipatio must be repeated anew each time.[3] Such was as yet the clumsy and backward condition of the law governing the ordinary dealings between man and man.

Mancipatio being a sale, the mancipio dans (the vendor) became answerable for a warranty (auctoritas). If a third party sought to oust the mancipio accipiens (the purchaser) from possession of the thing on the ground that his title was superior to that of the purchaser—he (the third party) claiming to be the true owner of the thing himself—the mancipio dans was bound to intervene in the action as warrantor (auctor) in order to defend his purchaser. If he failed to defend the purchaser, or defended him with insufficient success, he became liable to an 'actio auctoritatis' (an action for breach of warranty), in which the purchaser claimed double the price named in the mancipatio. It was on account of the liability thus imposed on the vendor that mancipatio was sometimes called 'nexum'. In the language of the early law nexum means any money transaction, any transaction 'quod per aes et libram geritur', the effect of which is *to bind*, that is, to create a liability.[4]

2. Nexum.

Next to mancipatio we have 'nexum', in the narrower sense of the word (called 'nexum', simply, in the language of the later law), a solemn loan effected (like mancipatio) per aes et libram. In the presence of five witnesses the libripens weighs out to the borrower the corresponding amount of raw metal, and the borrower becomes thereby bound (damnas) to repay that amount to the lender. The form of the transaction, more particularly the presence of the witnesses, had the effect of *binding* the borrower, that is, of imposing on him a legal obligation to repay.[5] Hence the name 'nexum'.

[3] It appears from a document recently discovered in Pompeii that even in the first century of our era it was necessary, in mancipating several slaves, to repeat the whole mancipatio ceremony specially for each separate slave. Cp. Eck, *ZS. der Sav. St.*, vol. ix. p. 87.

[4] Mitteis, *Über das nexum, ZS. d. Sav. St.*, vol. xxii. (1901) p. 100 ff.; Rabel, *Die Verhaftung des Verkäufers wegen Mangels im Rechte*, vol. i. (1902) p. 5 ff.

[5] According to the theory of nexum which has hitherto been generally

Here again, the result of the introduction of coined money was that the loan, as carried out in the nexum itself, became a mere form, the actual loan being an independent matter. Nevertheless, nexum, like mancipatio, preserved its material character as a transaction subserving a single definite purpose. For nexum was not available for the creation of any kind of debt, but only for the creation of a debt based on a loan.[6] Thus we see that the law of contract, too, was narrow and meagre, like the whole life of this early period.

Mancipatio is a ready-money transaction. It does not, as such, bind the purchaser to pay the price, but only makes the payment a condition precedent to the passing of ownership. Nexum, on the other hand, is a transaction on credit. Its effect is to place the borrower under an obligation to repay. If he fails, the debt is followed by execution.

Execution of the debt created by nexum proceeds directly with inexorable rigour against the person of the condemned debtor. He falls into the power of his creditor, who may bind him and cast him into chains. After having thrice publicly invited some one to come forward and release him, the creditor may—in default of any one appearing, and after the lapse of sixty days—regard the debtor as his slave, and may either kill him or sell him trans Tiberim, i. e. into a foreign country (Etruria). If several creditors have claims upon one and the same debtor, the law allows them to cut the debtor into pieces, and provides that a mistake in the division shall not prejudice their rights. The only way in which an insolvent debtor could escape the fatal consequences of an action on the nexum and the execution to which it gave rise, was by what was called 'se nexum dare', that is, by a process of self-pledge

accepted, and which was set forth for the first time by Huschke in his essay on nexum published in 1845, nexum was a transaction of a public character which invested the creditor with a direct right of execution (manus injectio) against his debtor (see note 7). This theory has now been refuted by Mitteis; *loc. cit.* in note 4, p. 96 ff. The same periodical (vol. xxiii. pp. 1 ff., 84 ff., 348 ff.) contains an examination of Mitteis's arguments by Bekker, Lenel, and Mommsen, who, while partly accepting the new view, point out some difficulties to which it gives rise.

[6] This follows from the legal rules as to nexi liberatio (infra, § 89). It appears, therefore, that in nexum as well as in mancipatio the material character of the transaction must have been brought out in the ceremonial in some way or other, so that, just as the purchaser did not acquire ownership by the bare form of mancipatio alone, so here the debtor did not incur an obligation by the bare form of nexum alone.

which made him the bondsman of his creditor, and thus saved him from being put to death or sold into a foreign country.[7]

XII tab. III. 1–4: Aeris confessi, rebusque jure judicatis, XXX dies justi sunto. Post deinde manus injectio esto. In jus ducito. Ni judicatum facit aut quis endo eo in jure vindicit, secum ducito, vincito aut nervo aut compedibus XV pondo, ne minore, aut si volet majore vincito. Si volet, suo vivito. Ni suo vivit, qui eum vinctum habebit, libras farris endo dies dato, si volet plus dato. 6: Tertiis nundinis partis secanto. Sin plus minusve secuerint, se fraude esto.

The rigour of the private law finds its counterpart in the rigour of the family power. Within his family the paterfamilias is an absolute sovereign; he has power over the life and liberty of any member of the household. The only external checks on the exercise of his legal rights are furnished, not by the law, but by religion and custom.

It is nevertheless apparent from the Twelve Tables themselves that Roman law had already, at this early period, arrived at a comparatively advanced stage of development.

The very fact that, in the Decemviral Code, the law of the city assumed the form of statute-law on so comprehensive a scale is in itself characteristic of Roman law. The history of German law—in its earlier stages and down almost to the close of the Middle Ages—is marked by the preponderance of customary law; in other words, the development of the law is for the most part an unconscious and what may be called an artless process. The authentic history of Roman law, on the other hand, begins at once with an elaborate piece of codification. Under the influence of city-life the tendency of the law to adopt the trenchant and summary form of a statute gathers speed. It was the struggle between patricians and plebeians that led to the decemviral legislation. The object of reducing the law to writing was to put a check on the arbitrary authority of the patrician magistrate (infra, p. 55). The purpose was not so much to alter the law, as to fix, definitively and in writing, a law which

[7] Mitteis, *loc. cit.*, p. 118 ff.—According to the theory which has hitherto prevailed (see note 5) every nexum, as such, entitled the creditor to seize his debtor and take him home as his bondsman; in other words, to resort to manus injectio without bringing any action at all. This theory was based on the statements contained in our authorities with reference to the above-mentioned practice of 'se nexum dare' on the part of an insolvent debtor who thereby sought to escape the creditor's action on the nexum.

should be the same for both orders. And the Twelve Tables themselves are the best proof that the law of the city had matured sufficiently to admit of its contents being formulated in vigorous language.

It is in keeping with the advanced character of Roman law that, even at this early age, loans and sales—negotia per aes et libram—should occupy the central position in the private law of the Twelve Tables. The period of barter was long past. At the time of the decemviri the copper ingot (aes) had been established for a great many years as the principal power in commerce, and notwithstanding the change of currency it was retained in the ceremonial of nexum and mancipatio, because its use was sanctioned by immemorial observance. Simultaneously with the Twelve Tables coined money was introduced into Rome. The economic conditions of the city were tending to establish themselves on a money basis. What was a man's by purchase was in the true sense his own, and only things that could be purchased (res mancipii) could be objects of true ownership. Even land had become a res mancipii, a purchasable thing of value that could be 'taken with the hand', and, as such, had been added to the list of articles of free commerce. But the number of things which the law deemed purchasable was still strictly limited. The term 'res mancipii' (or 'mancipi') as yet only covered the necessary appendages of a peasant's farm and the farm (fundus) itself (infra, § 59 III). At the same time the enormous power of capital, and the resulting annihilation of insolvent debtors through the medium of the action founded on nexum, are unmistakable evidence of the fact that the age we are concerned with was one in which capital was still scarce.

The law of the Twelve Tables was a law for citizens, but for peasant-citizens only, a cumbrous, rigid, and inflexible law.

§ 12. *The Interpretatio.*

The Twelve Tables had exhibited early Roman law in a form corresponding to its tendency, the form, namely, of a popular statute.

In the original stages of its development the law of Rome, like that of other nations, was of the nature of customary law, and there were some rules of customary origin, resting on immemorial usage and gradually shaped into precision by the legal habits of

the nation, which possessed the full force of lex, and even of lex in the most emphatic sense of the word, in the sense namely of the 'old, unchangeable, primal law'[1] of the Roman community. But, generally speaking, it was held that the magistrate, in administering justice, was not bound by rules of customary law as such (so far as those rules lacked the force of ancient primal law), and that in dealing with any such rules he was justified in exercising a free discretion. It was felt that the rules of customary law lacked that definiteness of form without which their true legal bearing could not be clearly ascertained. The Romans regarded customary law as embodying what were essentially matters of fact (consuetudo),[2] matters which were therefore rightly subject to the transforming influences of the organs of the law. But a Lex (publica), a rule of law which magistrate and people had agreed upon by means of a solemn declaration of consensus, was a different matter.[3] The authority of a lex was irrefragably binding on the magistrate as well as on the people.

In the Twelve Tables Roman law had, to a considerable extent, received the form of a lex.[4] It is to this fact that the success and

[1] Mommsen, *ZS. d. Sav. St.*, vol. xii. p. 275 ff.

[2] Cp. A. Pernice, *Parerga X*, *ZS. d. Sav. St.*, vol. xxii. p. 59 ff.

[3] Lex (Icelandic: lag, lög; Frisian: laga, lag, log; Anglo-Saxon: lagu, lah; Saxon: lach; English: law) means literally that which is 'laid' or 'fixed', in other words, 'a statute.' In the language of the Romans lex means that which is 'laid down' or 'settled', and which one party proposes in a certain form and the other party accepts (e. g. the 'lex commissoria', infra, § 72). A lex publica, then, is a covenant, or statute, proposed by the magistrate and accepted by the people, which binds the community in virtue of this reciprocal declaration. Cp. Mommsen, *Röm. Staatsrecht*, vol. iii. pp. 308, 309; A. Pernice, *Formelle Gesetze im Römischen Recht* (Festgabe für Gneist), 1888; Wlassak, *Röm. Processgesetze*, vol. ii. p. 94 ff.

[4] Some isolated laws were made as early as the regal period. Servius Tullius, for instance, is credited with some laws on contracts and delicts. The 'leges regiae', however, which were collected in the so-called jus Papirianum (probably a private compilation dating from the close of the Republic), owe their name either to the fact that the king was, by virtue of his sacerdotal position, the organ of the fas, or law willed by the gods (supra, p. 22, n. 2), or merely to the fact that the regulations they contain were placed under the immediate protection of the kings. The name of 'royal laws' was applied to early Attic regulations of ceremonial ritual, merely because their administration was the official duty of the Archon Basileus; v. R. Schöll, pp. 88, 89 of the *Sitzungsberichte der Bayerischen Akademie d. Wissenschaften*, 1886. These 'leges regiae' are concerned, in the main, with 'sacred' matters, i. e. they are essentially of a religious and moral character, and bear clear testimony to the closeness of the original connexion between law and religion. It is probable that, in substance, the

popularity of the decemviral legislation is due. So far as it was exhibited in a codified form, the law was now secure from the arbitrary powers of the magistrate who administered it.

L. 2 § 1 D. de orig. juris (1, 2) (POMPONIUS): Et quidem initio civitatis nostrae populus sine lege certa, sine jure certo primum agere instituit omniaque manu a regibus gubernabantur.

TACITUS, Annal. III. 27: compositae duodecim tabulae, finis aequi juris.

The decemviral legislation being accomplished, the energies of the three succeeding centuries were concentrated on the complete working out of its contents. During the Republic, changes by statute in matters of private law were exceptional, and the task of interpreting and, at the same time, developing the law of the Twelve Tables was left, in the main, to the operation of the existing legal agencies. The period of legislation was followed by the period of interpretation.

The exigencies of commerce demanded new regulations. How to represent these new regulations as virtually contained in, and covered by the statutory force of, the law of the Twelve Tables, was thus the problem to be solved. The notion of formally superseding the law of the Twelve Tables, which was statutory, by conflicting rules of law which were merely customary, would, at that time, have appeared inconceivable to the Romans. For throughout the long period of one thousand years, extending down to the final stage in the development of Roman law—i. e. down to the Corpus juris civilis of Justinian—the legal force of the Twelve Tables, as the source of all Roman law, was regarded all along as remaining, in theory, unimpaired, in spite of the fact that, when the end came, there was not a stone in the entire structure of the decemviral laws but had long been displaced from its original position. And this was quite in keeping with the conservatism of the Romans and the extreme caution with which they proceeded in all matters of law. Not one letter of the Twelve Tables was to be altered, and yet the new spirit was to be infused into the old letter. The decemviral legislation being complete, the time had arrived

majority of them actually date back to the time of the Kings. Bruns, *Fontes*, p. 1 ff.; Mommsen, *Röm. Staatsrecht*, vol. ii. (3rd ed.) p. 41 ff.; Karlowa, *Röm. RG.*, vol. i. (1885) p. 106; Voigt, *Die leges regiae* (1876); P. Krüger, *G. der Quellen u. Litteratur des Röm. R.* (1888), pp. 4–8; Jörs, *Röm. RW.* (1888), p. 59 ff.

for an 'interpretatio' which should develop and even alter the law, but should, at the same time, leave the letter of the law intact.

The period of interpretation covers the later centuries of the Republic. At the outset the work of interpreting the law—i. e. of carrying on, in its initial stage, the development of the jus civile [5]—was performed by the pontiffs. It was regarded as the special professional duty of the pontiffs to preserve the knowledge of the laws of the Kings. In consequence more particularly of the knowledge they thus possessed, and also of their general scientific learning, it became their office to assist with legal advice, not only magistrates in regard to the exercise of the jurisdiction vested in them, but also private parties in regard to the steps to be taken in concluding contracts and carrying on lawsuits (infra, § 18). Thus it happened that the business of interpreting the existing law, and thereby developing the civil law, passed under the control of the pontiffs.

It was by means of such interpretation that the so-called In Jure Cessio was now developed. In jure cessio was a new way of conferring a legal title by means of a fictitious lawsuit before the magistrate. The beginnings of in jure cessio probably date back to a time anterior to the laws of the Twelve Tables, but its full development belongs to a period subsequent to these laws. The Twelve Tables provided that whenever one party to an action, at the suit of the other, at once admitted his opponent's title in person before the magistrate ('in jure'), no judgement should be required, and the party confessing should be regarded as already condemned (confessus pro judicato est).[6] The confession before the

[5] The law based on the interpretation of the jurists was called jus civile in the narrower sense, and was distinguished, as such, from the 'jus legitimum', or law directly contained in the lex itself. Ehrlich, *Beiträge zur Theorie der Rechtsquellen* (1902), p. 1 ff.

[6] That the maxim 'confessus pro judicato est' (l. 1 D. 42, 2) occurred in the Twelve Tables in some form or other, either directly or indirectly, seems a reasonable inference from the statement of the jurist Paulus (Vat. fr. 50): 'et mancipationem et *in jure cessionem* lex xii. tab. confirmat.'

It is extremely probable that the starting-point in the development is to be found in the fictitious suit on a question, not of ownership, but of *status*, such a suit being first employed for purposes of manumission. Livy tells us (ii. 5) that it first came into use in the beginning of the Republic, which would be not long before the Twelve Tables. The oldest times knew of no juristic act by means of which a manumission could be effected. In jure cessio was thus invented in order to render manumission possible, and was

magistrate had the force of a judgement. Thus, in a suit about ownership, the magistrate could at once proceed to award the thing to the plaintiff (the 'addictio'). In other words, if a person confessed before the magistrate that his opponent in the action was the owner, he was divested of his ownership, provided that at the moment of the confessio he was still owner. This suggested a general method of transferring ownership. If A desired, on any legal ground whatever, to transfer his ownership in a thing to B, A and B would go before the magistrate, B (the intended transferee) would claim ownership as fictitious plaintiff, A (the intended transferor), as fictitious defendant, would admit his title, and the magistrate would then pronounce his award (addictio) in favour of the transferee. Thus the transferor was divested of his ownership and the transferee was invested with it. A rule of procedure (confessus pro judicato est) had been utilized for developing a new kind of private juristic act—the act of transferring ownership by means of a fictitious vindicatio (in jure cessio)—and one the validity of which could be represented as resting on the Twelve Tables. The same process could be utilized for establishing patria potestas and effecting the manumission of a slave by means of a fictitious vindicatio 'in patriam potestatem' and 'in libertatem' respectively. Thus in jure cessio became the medium through which a whole host of new juristic acts were introduced into the working system of Roman law.[7]

used for the first time (according to the legend reported by Livy) in favour of the slave who discovered the conspiracy of the sons of Brutus. Cp. Karlowa, *Röm. RG.*, vol. ii. p. 130.

In an in jure cessio the fictitious defendant himself directly confesses that he has no title. As distinguished from the judgement of a judex, which only declares a legal relationship already in existence, this self-condemnation of the defendant is tantamount to a valid disposition (cessio), i. e. it operates not to declare, but to *constitute* a legal relationship. That is the reason why, on principle, the judgement of a judex only operates 'inter partes', why, that is, its effect is confined to the parties themselves; whereas the self-condemnation of the defendant *produces* a new legal relationship. The confessus in jure is divested of his right, and that even though he may fail to effect a transfer of it to the other party (cp. *e.g.* § 109, end of n. 3). This is the foundation of the legal force of in jure cessio as against third parties as well, for the disposition which is implied in the confessio in jure confers on the other party a title available against every one, provided of course the person making the disposition was himself really the owner. See, on this question: Demelius, *Die Confessio im röm. Civilprocess* (1880), p. 98 ff.; Pernice, *ZS. der Sav. St. für RG.*, vol. ix. p. 203.

[7] In jure cessio was used for the purpose (1) of manumission (manumissio vindicta, infra, § 32); (2) of emancipation (§ 102); (3) of adoption (§ 100);

Another juristic act was developed in a similar manner by utilizing a penal provision of the Twelve Tables. This was the emancipation of the filiusfamilias. The Twelve Tables enacted that, if a father sold his son thrice into bondage, he should suffer the penalty of forfeiting his patria potestas.

XII Tab. IV. 2: Si pater filium ter venumduuit, filius a patre liber esto.

The interpretatio utilized this rule. The father might sell his son, by a purely imaginary sale, thrice repeated, into the bondage of another who would manumit the son after each sale by means of in jure cessio. The effect of this transaction was the emancipation of the filiusfamilias, i.e. he was discharged from the paternal power; for the conditions required by the Twelve Tables had been complied with. The father had thrice sold his son into bondage; consequently the son was now free from the paternal power. A different adaptation of the same penal rule led to the development of 'datio in adoptionem' (§§ 100, 102).

Of all the changes the most important was the transformation which mancipatio underwent in the course of the century subsequent to the Twelve Tables. The Twelve Tables enacted:

(4) of assigning a tutela legitima mulierum (§ 103, n. 2); (5) of assigning an hereditas (but only an hereditas legitima, § 109, n. 3); (6) of transferring ownership, both in res mancipi and res nec mancipi (§ 62); (7) of creating any kind of servitude (mancipatio being only available for the creation of rural servitudes, § 69, iv). The procedure was the same in all cases, whether the subject-matter of the claim were liberty, patria potestas, tutela, hereditas, ownership, or servitude. The alienee first makes a fictitious vindicatio in his own favour, the alienor then confesses 'in jure', and the magistrate makes his award (dictio, addictio) accordingly. The use of in jure cessio in cases 2, 3, and 7 can be assigned with certainty to a period subsequent to the Twelve Tables. The same is to be said of 4 and 5, because the sphere within which they are applicable is determined by the Twelve Tables themselves, in jure cessio being only available for the assignment of a tutela *legitima* mulierum and an hereditas *legitima*. Only the first case belongs most probably to a period anterior to the Twelve Tables (note 6, supra), but very possibly owes its general and unquestioned validity to the interpretation based on the Twelve Tables. It should also be observed that not every tutela legitima was transferable by in jure cessio, but only the tutela legitima *mulierum*. This fact shows that, at the time when in jure cessio was coming into use, the tutela legitima impuberum was already regarded as an 'officium' and, as such, unassignable, whereas the tutela legitima mulierum retained its original character of a special power which existed in the interest of the (agnatic) guardian, and might therefore be treated as assignable. Both the cases in which in jure cessio was applied, and the limitations which were imposed upon its use, point to the conclusion that it was not developed at a very early period. See also on this subject: Karlowa, *Röm. RG.*, vol. ii. pp. 383, 384.

XII Tab. VI. 1: Cum nexum faciet mancipiumque [8], uti lingua nuncupassit, ita jus esto.

That is to say, the formal juristic act was to operate in the manner defined by the solemn oral declaration (nuncupatio). Utilizing this rule, the interpretation changed the nature of mancipatio. It was the intention of the Twelve Tables that mancipatio should be a genuine sale, and it was essential for its validity that the purchase-money, as specified in the mancipatio, should be actually paid down. But there was nothing to prevent the parties from naming in the ceremony of mancipatio, not the real price, but a fictitious one, and since the payment of this price sufficed to call into play the operation of mancipatio as a legal conveyance, the parties were thus able, in effect, to evade the rule as to the necessity of paying the price. And this is what actually happened at a later stage. The outcome of this device was the so-called mancipatio sestertio nummo uno. In the mancipatio a declaration was made that the thing was being sold for 'one sesterce', and, the alienee having paid his sesterce,[9] ownership passed to him in virtue of the Twelve Tables. So far then as mancipatio took the form of a 'mancipatio sestertio nummo uno', it had passed from a genuine to a purely fictitious sale (imaginaria venditio).[10]

[8] Mancipium is the name given here to mancipation.

[9] It will be observed that the handing over of the aes (raudusculum), which was part of the mancipatio ceremony, was not sufficient. The requirement of the Twelve Tables concerning the payment of the price had also to be satisfied, and this was done by the payment of the nummus unus. True, such a proceeding was a violation of the spirit of the Twelve Tables, but the letter was strictly adhered to. And it was precisely in this that the peculiar nature of the interpretation lay: while professedly but interpreting the letter of the old law, it was really building up new law.

[10] A fictitious sale of this kind was resorted to, when it was desired e.g. to make a gift or pledge by mancipatio (cp. p. 60). But mancipatio nummo uno was also available in the case of real sales, and possessed then a twofold advantage, one in favour of the purchaser, the other in favour of the vendor. The purchaser was benefited in that the ownership passed by the mere payment of one sesterce, the rule of the Twelve Tables touching the necessity of paying the price being thus evaded. The vendor was benefited in this way: if there was a breach of warranty on his part, if, that is to say, the purchaser was evicted from possession of the thing mancipated by a person whose title was superior to his, he (the vendor) was, according to the Twelve Tables, compellable by the 'actio auctoritatis' to indemnify the purchaser to the extent of double the price solemnly named ('nuncupated') in the mancipatio. In the case of a mancipatio nummo uno 'double the price named' meant two sesterces, or practically nothing. Thus, by means of the

The result was that mancipatio became a general mode of conveying ownership as such, operating quite independently of the legal ground on which the conveyance was based. It could now be employed for a variety of purposes. It was, for instance, available for the purpose of making a gift. But there was another and a more important use to which it could be turned: the so-called mancipatio fiduciae causa had now become practicable. The mancipatio fiduciae causa, or, briefly, 'fiducia,' was a *qualified* mancipatio, the effect of which was accordingly to impose a *duty* on the transferee, and it was a transaction the nature of which rendered it conveniently available for economic purposes of the most multifarious kinds. Thus the change from the old mancipatio to the new was a change from a transaction narrow in character and circumscribed in application to one free from inward restrictions and capable of adaptation to an indefinite variety of uses.

Fiducia is an agreement of trust, whereby the transferee in a mancipatio undertakes to divest himself of the ownership which has been conveyed to him, and more especially—in certain circumstances—to remancipate the thing he has received.

Suppose, for instance, that a debtor desired to give his creditor a pledge. A transaction by which a person made his property simply liable for an existing debt, in the modern sense (a 'hypothec'), was unknown to the early Roman law. But mancipatio in its new shape would meet the necessities of the case. The debtor mancipated the thing to the creditor 'for one sesterce', and thus constituted him owner by means of an imaginary sale. But the creditor held the legal ownership subject to a trust (fidei or fiduciae causa), and the fiducia was to the effect that on payment of the debt the creditor should reconvey ('remancipate') the thing to the debtor. The creditor thus got his security, and meanwhile he was the owner of the thing pledged. But as soon as the debtor discharged the debt, the fiducia, or trust-clause, gave him a right to claim the thing back again. Other agreements could be concluded in the same way. In the case of the pledge just described there was a 'fiducia cum creditore contracta'. In precisely the same manner the so-called fiducia cum amico contracta could be used for effecting a depositum or mandatum in accordance with the

mancipatio nummo uno the actio auctoritatis was also excluded in spite of the Twelve Tables. Karlowa, *Röm. RG.*, vol. ii. pp. 371 ff., 377 ff.

forms of the civil law. Thus, whether the thing were delivered for safe custody—as in the case of depositum—or were delivered on terms that the transferee should, for instance, sell it, or give it to a third party, or (if the object were a slave) should manumit such slave—as in the case of mandatum—in any such case the transferor (the deponens, mandans) made the transferee (the depositarius, mandatarius) formally owner of the thing delivered, but the ownership was held subject to a trust, 'fiduciae causa'; it was purely formal, and involved an obligation to abide by the terms of the agreement on which the mancipatio was based.

There was no reason why the agreement that ownership should pass subject to a trust, should not be set forth in the formula used in the mancipatio (the 'nuncupatio').[11] The existence of a fiduciary duty was thus clearly established by the solemn act itself, but to embody the entire agreement in the nuncupatory formula was impracticable. The mancipatio itself, therefore, said nothing about the *terms* of the trust; for these it was necessary to look to the 'pactum conventum', a formless collateral agreement. But, according to early Roman law, no action can be brought on a formless pact. Is, then, a 'pactum fiduciae' actionable or not? The early jurists argued this way. Inasmuch as the pactum conventum as such is *not* actionable, that which is promised in the pactum cannot, as such, be enforced by an action. But the duty to deal with the object 'in good faith' *is* actionable. Having been clearly set forth in the solemn mancipatio this duty falls, of course, under the protection afforded by the rule of the Twelve Tables: 'uti lingua nuncupassit, ita jus esto.' The transferee thus became liable to an 'actio fiduciae'. It is

[11] The inscription, No. 5402, in vol. ii. of the Corp. inscr. lat., shows that this was actually done: D . . . fundum B . . . nummo I *fidi fiduciae causa mancipio accepit.* Cp. on this point, Degenkolb, *ZS. für RG.*, vol. ix. pp. 172, 174; Voigt, *Die zwölf Tafeln* (1883), vol. ii. p. 166 ff. Thus the words 'fidi fiduciae causa' formed part of the mancipatory act itself. But in this inscription the agreement which defined the conditions of the trust follows the words evidencing the mancipatio in the shape of an independent 'pactum conventum', which proves that the agreement in question was a matter apart from the mancipatio. The document containing a fiducia which was recently discovered in Pompeii has so many lacunae that it is impossible to say whether the trust clause was inserted in the mancipatio or not. But here again, the pactum dealing with the position of the fiduciary transferee follows the words evidencing the mancipatio in the shape of an independent agreement. Cp. Eck, *ZS. der Sav. St.*, vol. ix. pp. 89, 96, 97.

important to observe what it was precisely that the plaintiff in this action could require the defendant (the transferee in the mancipatio) to do. He could not call upon him to do what he had promised in the pact, because the pact had not been 'nuncupated'. But he *could* call upon him to do that which any honourable and trustworthy man could be reasonably expected to do having regard to the circumstances of the case, the most important of which was, of course, the pactum conventum itself. In other words, what the judge had to find out was *not* whether the defendant had acted up to the precise terms of the pact—for the pact being formless, its terms were still quite unenforceable—but whether the defendant had conducted himself in such a way, 'ut inter bonos bene agier oportet et sine fraudatione.'[12] Since the pactum conventum lay outside the solemn mancipatio, the fiducia did not give rise to an actio stricti juris,[13] but to a so-called actio bonae fidei, i. e. the extent of the obligation which it produced was not fixed by any hard and fast line, but rather by the judge exercising, within fairly wide limits, his free judicial discretion.[14] In fiducia we have the first recognized

[12] If the judge decided against the defendant, the judgement did not mean that he (the defendant) had failed to meet a legal obligation, but rather that his conduct in the matter had *not been that of a man of honour*. That is why condemnation in an actio fiduciae entailed infamy (cp. § 36). Cp., on this point, Jhering, *Das Schuldmoment im römischen Privatrecht* (1867), p. 29 ff., and note 14 below.

[13] Differing, in this respect, from other collateral agreements in mancipatio which were fully covered by the terms of the nuncupatio. Such were, e.g. the trusts imposed on the familiae emtor in the mancipatory will (infra, § 112).

[14] The actio fiduciae was presumably an 'actio in factum concepta'. (Cp. Lenel, *ZS. der Sav. St.*, vol. iii. p. 112.) Lenel himself has, however, pointed out (*Das Edictum perpetuum*, 1883, p. 234) that nothing is thereby proved in regard to the later origin of this action. But the fact of its being an actio in factum concepta seems rather to point to the conclusion that, in the old times, the actio fiduciae was tried by means of the legis actio per judicis postulationem (infra, § 48, ii). See Voigt, *loc. cit.*, p. 475 ff.—At a later time, the other actiones bonae fidei seem also to have first come into use in the shape of actiones in factum conceptae. For since an informal promise was originally not legally, but only morally binding, the plaintiff was precluded from setting up a legal claim which the defendant had not satisfied, and could only allege some fact which went to show that the defendant's conduct in the matter was unjust. This explains the connexion between the actio bonae fidei in its earliest form and the actio ex delicto. Cp. n. 12, supra, and the passage from Jhering referred to.—A different view is taken by A. Pernice (*Labeo*, vol. iii. pt. 1, p. 124) and Karlowa (*Röm. RG.*, vol. ii. p. 561 ff.), who hold that the actio fiduciae was an actio in jus concepta.

instance of a contract different in kind from the legal transactions which had been handed down from olden times. For the extent of the obligation engendered by these transactions was rigorously determined by the letter of the agreement; in fiducia, on the other hand, it was equitably determined in accordance with the free discretion of a 'bonus vir' taking into account all the circumstances of the case. It was a contract which placed the existence of a liability beyond all doubt, but which was neither designed nor able to fix, in set terms, its precise contents.

Thus the interpretation of the Twelve Tables, in dealing with mancipatio—the formal, rigorous, ready-money sale of the early law—had produced a twofold result:

(1) It had developed a formal method of transferring ownership for any purpose whatsoever; that is to say, it had developed a transaction of an 'abstract' type in which the object underlying the transfer of ownership did not appear, and which, for that very reason, could be utilized for any such transfer, no matter what its object might be.

(2) It had developed a whole series of transactions (bonae fidei negotia) based upon *credit*, being the various cases of fiducia which were concluded 're', by performance, that is, by mancipation (sestertio nummo uno).[15]

[15] After the example of mancipatio fiduciae causa an in jure cessio and coëmtio (§ 92) 'fiduciae causa' came subsequently into use. Just as the transferee in mancipatio (n. 11) declared that he took the legal ownership 'cum fiducia', so, in the case of in jure cessio, the person making the fictitious vindicatio declared that he was only owner 'fiduciae causa'. The vindicatio, therefore, was made, as in other cases, 'adjecta causa.' Cp. Voigt, *loc. cit.*, p. 172. In every instance the solemn declaration set forth that the conveyance of ownership, or (in the case of coëmtio) of marital power, was merely formal. Thus the extraneus with whom a woman had concluded a coëmtio fiduciae causa (e.g. for the purpose of freeing herself from guardianship, § 103, n. 2)—with whom, in other words, she had formally contracted a marriage—was not her maritus, nor was he called so; he was her 'coëmtionator', and, as such, had neither the rights nor the power of a husband (GAJ. i. 115). The effect of the fiduciary clause was not merely obligatory, but also *real*, i.e. it altered the character of the right of property itself; in other words, fiduciary ownership was different in kind from ordinary ownership. This explains why the 'usureceptio ex fiducia' was possible, i.e. why it was that the transferor could, by means of usucapio, without bona fides (GAJ. ii. 59, 60), recover the very ownership he had transferred. And it was this very difference in kind, again, that made it possible for the alienee in mancipatio and in jure cessio to claim a merely fiduciary ownership. No fiducia could, however, be concluded by means of a mere formless traditio. See Lenel, *ZS. d. Sav. St.*, vol. iii. pp. 114, 115, and infra, § 69, note 1 on deductio servitutis.

With regard to Nexum, no corresponding development took place. Nexum remained what it had been, a loan, and was subsequently superseded as such by the formless loan called 'Mutuum' (infra, p. 69). The sole trace of the original severity of the formal contract of loan is to be found in the fact that mutuum was a stricti juris negotium (§§ 76, 79). It was reserved for 'Stipulatio' (infra, § 80) to supply a type for all agreements in which the solemn promise of the debtor gives rise to a rigorously unilateral obligation quite irrespective of the legal ground on which such obligation is based. Stipulatio was the outcome of the ancient 'sponsio', and probably represented originally a kind of self-pledge, but a self-pledge that could only be enforced by the gods.[16]

As the mancipatio fiduciae causa supplied the foundation for the negotia bonae fidei of a later period, so nexum is the type and basis of the stricti juris negotia, the transactions which generate a rigorously unilateral obligation and leave no latitude to the discretion of the judge.

§ 13. *The Beginnings of the Jus Gentium.*

From the earliest times there must, of course, have existed in Rome, side by side with the formal juristic acts which alone enjoyed the legal sanction of the jus civile, a countless variety of transactions that were dispatched without any form whatever. It happened, as a matter of course, that many a sale was made by simple delivery of the article and payment of the price, many a loan, too, contracted by a simple handing over of the money, and so forth. In other words, there were informal sales, and loans, and deliveries (with a view to transferring ownership in things). But

[16] Sponsio was the name originally given to a contract concluded by a libation, i.e. by a formal self-denunciation, to the following effect:—Even as this wine now flows, so may the punishing gods cause the blood of him to flow who shall be the first to break this covenant. Cp. Leist, *Gräco-italische Rechtsgeschichte* (1884), p. 457 ff. The obligation originally created by such a promise (which was closely akin to an oath) was a purely moral, or religious one. It was not till later that the obligation assumed a legal character (cp. § 80). When Cicero speaks of 'spondere, promittere' involving an 'obligare fidem', his words seem to point to some surviving notion of a pledge of one's moral self; cp. A. Pernice, *Labeo*, vol. i. (1873) p. 408. German law confirms the view that all the oldest contracts originated in some kind of pledge (obligatio), whether of one's person or of portions of one's property. Cp. e g. J. Kohler, *Shakspeare vor dem Forum der Jurisprudenz*, vol. i. (1883) p. 52 ff.; Heusler, *Institutionen des deutschen Privatrechts*, vol. i. (1885) p. 104; Puntschart, *Schuldvertrag u. Treugelöbnis* (1896), p. 406 ff.

according to the early civil law all these informal proceedings were totally devoid of legal validity. That which was effected by an informal sale was, of course, a transaction, but not a legal transaction. Thus if A sold and delivered something to B which did not belong to him, and B were evicted by the true owner, he had no action against A. There was no question of law at all; the whole relationship between A and B was purely one of fact, and might, in this respect, be compared to the relations to which our dealings with savage tribes give rise. We may sell to them, and barter with them, but no *legal* relations, no actionable rights, are called into existence. Good faith as between man and man, what the Romans termed 'bona fides', was the natural foundation on which all these informal transactions rested,[1] but as yet bona fides had not become a source of law in Rome.

There was, however, one element that was bound, in the long run, to secure the legal recognition of these formless transactions. This element was the foreign trade, in so far as it was carried on within the confines of Rome. Every alien (i. e. non-citizen) was, as such, absolutely debarred from any share in the jus civile, the law as between Roman citizens, and, as a consequence, he was absolutely debarred from the use of any of the formal juristic acts of the Roman civil law. In the early law every alien was, on principle, right-less. Mancipatio and nexum were both null and void, if one of the parties, nay, if one of the witnesses, were without the Roman civitas. Thus, even though a foreign merchant (i. e. one who did not enjoy the privileges of Roman citizenship) were quite willing, in doing business in Rome, to observe the forms, say, of mancipatio, it would have been useless, because the mancipatio would have been none the less void. The result was that the commercial dealings of aliens in Rome, including, therefore, the dealings of aliens with Roman citizens, were at all times confined, without option, to the formless transactions just referred to. For aliens these were the only transactions. Of course such a system could not last. The commercial transactions of the foreign merchants could not remain permanently outside the pale of the law, and some method had to be devised by which they should obtain legal validity, not only if both parties were aliens, but also if one of them were a Roman citizen. Inasmuch, moreover, as even Roman citizens, among

[1] With the exception of mutuum, supra, p. 64.

themselves, were making daily and habitual use of these informal acts, it was quite obvious that their gradual recognition by the law was a matter of pressing importance to citizens and aliens alike.

At a subsequent period the law under which aliens traded in Rome assumed a shape which served to bring out the full significance of the process with which we are here concerned. In the course of the first centuries of its history (down to about 250 B.C.), the Roman community frequently concluded international and commercial treaties with other States (as, for example, Carthage), members of which were permitted to engage in commerce in the Roman market. By these treaties legal protection and legal capacity were reciprocally guaranteed to members of the communities concerned, the legal protection being secured in Rome by means of the courts of 'recuperatores'. Thus, by the second commercial treaty with Carthage, every Roman enjoyed, in Carthage, in regard to his commercial dealings, the same private rights as a Carthaginian citizen; and the Carthaginian enjoyed, conversely, corresponding rights in Rome (i. e. the 'commercium'). In this way it came to pass that a portion of the Roman civitas, viz. the jus commercii, was granted to non-citizens (peregrini), to such, namely, as possessed the privileges of an international treaty of friendship. Aliens of this kind were accordingly permitted to avail themselves of the juristic acts peculiar to the jus civile. Such treaties, however, only affected certain specified foreign communities, and even in these first centuries there were many peregrini in Rome who were shut out from the privileges they bestowed, and had no option but to use, in their dealings, those formless transactions which (as we have seen) produced, in the first instance, relationships of mere fact, devoid of all legal sanction. In all cases, however, where an alien of the privileged class had dealings with a Roman, the solemn acts of the Roman jus civile were available. In other words, the gates of the jus civile had been thrown open to such aliens as enjoyed by treaty the friendship of Rome. But all this changed after about the third century B.C. Rome becomes the great power which only condescends, in exceptional cases, to deal with other powers on terms of equality by means of treaties of friendship. Numerous communities are annihilated by the Roman State; their members are incorporated with the Roman community without any treaty and without being placed on a footing of equality with Roman

citizens ('dediticii'). The Roman civitas now becomes a valuable privilege. Even the mere jus commercii is only granted to non-citizens in exceptional cases, and the jus civile thus shuts its gates to the world without. The bulk of aliens whose business carries them to Rome have no legal capacity under the jus civile. It is at this stage of the movement that the true importance of foreign trade, so far as it is denied the privileges and protection of the jus civile, becomes strikingly manifest. It has, in fact, been raised to the rank of an independent power confronting the jus civile in Rome itself with distinct legal habits and distinct juristic acts (informal acts) of its own. It has now become absolutely impossible to maintain the old rule that the transactions of non-privileged aliens are not legally binding, and a law is imperatively demanded which shall recognize, govern, and sanction such transactions. The Roman magistrate had it within his power to render such a law a working reality. For as against aliens he, the praetor, the magistrate of the city of Rome, was not bound by the jus civile, nor even by popular statutes: popular statutes applied exclusively to citizens.[2] As far therefore as the affairs of aliens were concerned, the magistrate was absolutely unfettered in the exercise of his imperium. Accordingly, while the Roman praetor was dispensing justice to aliens, he was, at the same time, moulding and giving practical effect to a law for regulating the informal transactions of aliens—a law to which the restrictions peculiar to the transactions of the civil law were entirely foreign. In Rome a special judge for aliens, a 'praetor peregrinus', was appointed in 242 B.C. This marks the final victory of the movement. In the edict of the praetor peregrinus (infra, § 15) the law governing the relations of aliens took shape, and was, in a sense, codified. We have now a law for the citizen, as such, the jus civile, and, beside it, a *law* for the alien, as such, the jus gentium. Thus there sprang from the intercourse with foreigners the second great power in the working system of Roman law, the jus gentium, the law for foreigners, and it was the very exclusion of the great majority of foreigners from the privileges of the jus civile that rendered the birth of this new force possible. It is certain that the contents of the jus gentium were largely determined by the example of such laws as had come to regulate the rights of

[2] Wlassak, *Röm. Processgesetze*, vol. ii. pp. 93 ff., 188 ff.

foreigners in other commercial centres of the age. It is still more certain that the Roman jus civile itself was the model by which the praetor peregrinus was principally guided in shaping the law for foreigners in Rome. In order to adapt the jus civile for use in his court and thereby convert it into jus gentium, the praetor had first to strip it of its formalism: this done, the legal ideas underlying the forms of the civil law could be carried more completely into effect in the jus gentium and could, at the same time, be brought into closer accord with the current ideals of justice. The jus gentium was in truth a younger, a modernized kind of jus civile. And it is precisely to this fact that we must attribute the powerful influence which it was able to exercise in regard to the reform and development of the jus civile itself. We must, moreover, bear in mind that from this same time onwards the ancient national character of Rome was steadily yielding to the inroads, increasingly powerful, of foreign, more especially Greek, elements bearing within them the whole accumulated force of Hellenic culture. The entire world came, so to speak, to make Rome its capital, and with it came the jus gentium, a law, not for any particular State, but universal; a law not merely for the citizen, but for the *private person as such*. The jus gentium came to fulfil its twofold vocation. It was destined not only to determine the shape which the legal rights of aliens in Rome should assume, but to exercise a dominant influence over the Roman civil law itself. For by securing the legal recognition of formless transactions—transactions which depend for their effect not on any *form*, not on something visible, external, or tangible, but rather on the *will* of the parties themselves—the jus gentium was laying down the lines of a new development for the law governing the ordinary dealings between Roman and Roman.[3]

In this way it gradually came to be acknowledged that legal ownership (in res nec mancipi) could be validly acquired by means of a formless traditio. The only qualification seems to have been

[3] On the above subject, v. M. Voigt, *Jus naturale*, vol. ii. §§ 16, 21 ff.; Mommsen, *Röm. Staatsrecht*, vol. iii. (1887) pp. 590 ff., 600 ff.; Jörs, *Röm. RW. zur Zeit der Republik* (1888), pp. 114 ff., 126 ff.; Ad. Schmidt, *ZS der Sav. St.*, vol. ix. p. 137 ff.; Eisele, *Abhandl. zum röm. Civilprozess* (1889), pp. 69 ff., 100; Mitteis, *Reichsrecht und Volksrecht* (1891), p. 72 ff.; Wlassak, *Röm. Processgesetze*, vol. ii. pp. 129 ff., 239 ff.; and Degenkolb's Rectorial Address referred to infra, § 49, n. 7.

that such traditio, in order to pass ownership, must take place in pursuance of a sale, and that the purchaser must have actually paid the price. For the rule of the Twelve Tables that no ownership could pass to the purchaser unless he actually paid the price or were given credit for it by the vendor, was deemed to apply, in an equal measure, to the transfer of ownership by traditio.[4] The principle thus adopted in regard to sales—viz. that ownership could pass by traditio—was afterwards extended to traditio in general, if only the parties had concluded some transaction which placed the intention to convey ownership beyond doubt. Thus the necessity for a solemn mancipatio was, in the end, confined to certain classes of things only, viz. those comprised under the collective name of 'res mancipi' (§. 62). Res mancipi comprised all such things as constituted, properly speaking, a farmer's stock-in-trade: his land (fundus Italicus), his slaves, his live-stock (beasts of draught and carriage). In the case of all other things—the 'res nec mancipi'—ownership passed by mere traditio, that is, by simple delivery of the thing on the ground of some juristic act clearly showing an intention to transfer ownership. Such things would be e.g. money, articles of dress, tools; in short, all such things as were intended, not so much for permanent possession, as for commercial intercourse.

In the same way as informal traditio thus obtained the sanction of the law, so informal sales and loans, and other informal transactions, gradually secured legal recognition.

The old-fashioned formalities of the Roman jus civile found themselves confronted with the exigencies of a world-wide commerce. The new demands which had thus arisen had won their first victory towards the close of the Republic by securing the recognition of a number of formless juristic acts. The whole future course of development was virtually involved in this recognition. Thus the end of the Republic marks the commencement of the process by which the local law of the city of Rome was gradually converted into what Roman law was destined, at a future time, to be, viz. a general law for the civilized world.

[4] Cp. § 41 I. de rer. div. (2, 1), supra, p. 49, n. 2[a].

CHAPTER II

ROMAN LAW AS THE LAW OF THE WORLD

(THE EMPIRE)

§ 14. *Jus Civile and Jus Gentium.*

JUS CIVILE was the law of a city, the law, that is, which obtained among cives, its application being confined to the citizens of the Roman community. It was destined to be replaced by a different kind of 'civil' law, a civil law enlarged into a jus gentium, or general law for all mankind.

The local law of Rome had already adopted a number of juristic acts which were all characterized by formlessness, ease of application, and free adaptability (§ 13).

The Romans themselves had not failed to observe that their law already contained two distinct ingredients, one of which operated by virtue of its form and was derived from their old jus civile (the civil law, in the strictest sense of the term), while the other was free from formal elements, and owed its adoption and validity as law to the contact between the commerce of Rome and that of the world at large. The former bound none but Roman citizens, to whose mutual dealings alone it applied: the latter was binding on, and applicable to, the peregrini as well. The former kind of law, which was specifically Roman—the civil law of the old type—was now called jus civile in the special and narrower sense of the term, the 'jus proprium civium Romanorum'.[1] The jus gentium, on the other hand, came to be regarded as a universal law, as a law common to all mankind (jus gentium quod apud omnes gentes peraeque custoditur), because based on the nature of things and the general sense of equity obtaining among all men,—a sort of natural law, exacting recognition everywhere by virtue of its inherent reasonableness. It would, however, be erroneous to suppose that

[1] In modern phraseology 'civil law' is used for 'private law' simply; the Romans meant by civil law the law which obtains among 'cives'.

the Romans attempted to introduce a code of nature such as the philosophers had devised. The jus gentium was and never had been anything but a portion of *positive Roman law* which commercial usage and other sources of law, more especially the praetorian edict (§ 15), had clothed in a concrete form. Nor again must it be imagined that the Romans simply transferred a portion of foreign (Hellenic) law bodily into their own system. In the few exceptional cases where they did so (e.g. in the case of hypotheca), they never failed to stamp a national Roman character on the institution which they borrowed. The antithesis between jus civile and jus gentium was merely the outward expression of the growing consciousness that Roman law, in absorbing the element of greater freedom, was commencing to discard its national peculiarities and transform itself from the special local law of a city into a general law for the civilized world. The jus gentium was that part of the private law of Rome which in its fundamental conceptions was in accordance with the private law of other nations, more especially with that of the Greeks, which would naturally predominate along the sea-board of the Mediterranean. In other words, jus gentium was that portion of the positive law of Rome which appeared to the Romans themselves as a kind of 'ratio scripta', a law obtaining among all nations and common to all mankind.

The value of the division of Roman law into jus civile and jus gentium was not merely theoretical, but also eminently practical. The law which now governed the intercourse of foreigners—Greeks, Phoenicians, Jews—in Rome was, of course, Roman law, but it was Roman jus gentium, and the Roman jus civile, in the narrower sense of the term, was confined on principle to the mutual dealings between Roman citizens (cp. § 33). The jus gentium was thus, at the same time, the Roman law for foreigners, i.e. the law which governed the transactions of the peregrini. And it was but natural that such should be the case, since it had been shaped under the influence of foreign intercourse, and had received definite form for the first time in the edict of the praeter peregrinus.

There is a moment in the history of every nation when the claims of a natural sense of justice assert themselves and revolt against the hard and fast austerities of ancient traditional forms. The Romans had now arrived at this stage. The jus gentium represented the jus aequum the development of which, in opposition to the jus

strictum of ancient tradition, proceeded henceforward with ever increasing power. The whole tendency of the history of Roman law pointed to the suppression of the jus strictum by this new equitable law, and to the consequent destruction of the ancient jus civile by the jus gentium. But it must not be imagined that the development was a very sudden one. Such a course would have been entirely alien to the legal instinct of the Romans. The jus gentium did not come down like a hurricane and sweep away the jus civile. The slow and gradual elaboration of a system of equity alongside the older and stricter law was rather the work of a patient and uninterrupted development extending over a period of more than five hundred years. When, in the natural course of things, the vitality that once filled the forms of the jus civile had passed from them, leaving them but hollow relics of a bygone age, then, but not till then, were they finally discarded. Slowly, cautiously, and, as it were, bit by bit, portions of a freer and more equitable law were worked out and tested—first one, then another—and finally incorporated in the organism of Roman law. The reform of Roman law was the result of a vast series of small changes of detail. And it was only by painstaking care of this description, by scorning all appeals to vague general principles of equity, that the Romans, aided by that keen sense of form, moderation, and legality, which with them was hereditary, could succeed in reducing the jus aequum to a body of principles lucidly conceived, minutely elaborated, and carefully weighed in all their details. By such a method alone could Roman law, while its contents were freely developing over so vast a field, preserve intact throughout that artistic power which moulds and subdues its materials, and erects them into a firm harmonious structure. It is this power which has made Roman law, and more especially Roman private law, what it is: a model for all times to come such as has never since been equalled.

In working out the jus gentium—those rules of natural equity which regulate the dealings between man and man—and in reducing it to a system of marvellous transparency and lucidity, which carries irresistible conviction by its form as well as its matter to the mind of every observer—in doing this, Roman law has performed its mission in the world's history. And it was this achievement, successfully accomplished for all time to come, that not only fitted Roman law for becoming the general law of the Roman empire,

but also endowed it with the power, when once it had emerged from the oblivion of centuries, to conquer the modern world.

There were three agencies whose influence in working simultaneously and successively at this identical task—the developing and importing of the jus gentium—was decisive of the ultimate result. These were the praetorian edict, Roman scientific jurisprudence, and imperial legislation.

CICERO de offic. III. 17: Societas enim est, latissime quae pateat hominum inter homines, interior eorum qui ejusdem gentis sunt, propior eorum qui ejusdem civitatis. Itaque majores aliud jus gentium, aliud jus civile esse voluerunt: quod civile, non idem continuo gentium, quod autem gentium, idem civile esse debet.[2]

GAJ. Inst. I. § 1: Omnes populi qui legibus et moribus reguntur partim suo proprio, partim communi omnium hominum jure utuntur: nam quod quisque populus ipse sibi jus constituit, id ipsius proprium est vocaturque jus civile, quasi jus proprium civitatis; quod vero naturalis ratio inter omnes homines constituit, id apud omnes populos peraeque custoditur vocaturque jus gentium, quasi quo jure omnes gentes utuntur. Populus itaque Romanus partim suo proprio, partim communi omnium hominum jure utitur.

§ 15. *The Praetorian Edict.*

In the year 367 B.C. the judicial functions were separated from the consular power, and a special officer, the praetor urbanus, was appointed to administer justice in the city. Subsequently (about 242 B.C.) the increase of commerce necessitated the appointment of a second praetor, the praetor peregrinus, to whom all disputes were assigned where one or both of the parties were peregrini. The

[2] In the last sentence Cicero is not *criticizing* the jus civile and conveying an opinion that it *ought* to accommodate itself to the jus gentium. He is simply expressing the fact that that only can be jus gentium which actually obtains everywhere in the separate systems of positive municipal law, more particularly in Roman municipal law, or jus civile, in this sense of the term. Jus civile is not necessarily jus gentium, i.e. it does not necessarily obtain everywhere, but jus gentium is necessarily jus civile, because law which obtains everywhere must necessarily obtain with us, failing which it would not be jus gentium, or law which obtains everywhere. Jus civile is here used, not in the narrower sense of the specifically Roman law, but in the sense of municipal law, and is therefore used for Roman law simply. What is not law among the Romans, can obviously not be regarded as obtaining 'apud omnes gentes'. In this, the wider sense of the term, jus civile includes jus gentium within its limits, and jus gentium is thus not opposed to, but forms a portion of, Roman law.—In Verr. I. 13 Cicero calls the jus gentium 'communia jura', 'common law.'

jurisdiction of the praetor urbanus was henceforth confined to matters in dispute between Roman citizens themselves.

During his year of office, the praetor, like the consuls before him, was invested with the ancient judicial power of the kings.[1] That is to say, in the administration of justice he exercised a sovereign judicial discretion (imperium) which was only limited—in point of form, and solely as against Roman cives—by the letter of the leges or popular enactments, and by such customs as ancient tradition had endowed with the force of law (supra, p. 54). In modern times the judge is subordinate to the law. His sole business, in dispensing justice, is to *apply* the law. But the praetor, officiating in his court, was his own master; he was the supreme judicial authority. As a magistrate he represented, within the limits of his official powers, the sovereign populus Romanus. His administration of justice was, therefore, not merely an application of existing law, but was fitted to become an instrument for the creation of new law. It is necessary to bear this fact in mind in order to appreciate the peculiar importance of the praetorian 'edict'.

An edict is an order promulgated by a magistratus populi Romani. A praetorian edict, therefore, is an order promulgated by the praetor. It deals with the principles by which the praetor intends to be guided in his administration of justice, in other words, in the exercise of his free judicial discretion. Though the power of issuing commands—the imperium—vested in him from the very outset, it is not likely that he began to proclaim such edicts at once. He would, of course, in the first instance consider it his sole duty, in dispensing justice as between Roman citizens, to administer the existing law, and where foreigners were concerned—so far as the principles of his jurisdiction were not regulated by international treaties—he would probably content himself, at the outset, with deciding each case, as it came before him, on its merits. The process by which definite principles peculiar to the praetorian jurisdiction were worked out—principles which, when developed, tended

[1] The word 'praetor' means literally a general, and is a title of honour accorded to the consuls in the first centuries of the Republic (Mommsen, *Röm. Staatsrecht*, vol ii. 3rd ed. p. 74 ff.). The praetor was really a third consul who was specially entrusted, not with the military command, but with the administration of justice. This is the reason why, in point of rank (and in the number of his lictors), he was inferior to the consul, though, on principle, his power was consular (Mommsen, *ibid.*, p. 193 ff.).

more and more to constitute the praetorian power an organ of reaction against the principles of the civil law—was therefore, in the nature of things, a very gradual one, and it was only gradually that any occasion arose for the praetor to promulgate orders in regard to the granting of legal assistance. It would seem, however, that, even at an early period, it was usual to post up in the praetor's court a list of legal formulae for the better information of the parties to an action, e. g. of formulae for the interdicts for which application had to be made to the praetor—interdicts being commands by means of which the praetor, in the exercise of his administrative powers, granted an extraordinary remedy (infra, § 56)—and, again, of formulae for the processual sponsiones (processual agreements) which the praetor, under certain circumstances, exacted from the parties.[2] In addition to this tablet of formulae

[2] At the end of the Edictum Hadrianum there is an appendix consisting, for the most part, of nothing but formulae,—formulae, namely, for the interdicts, exceptiones and stipulationes (processual sponsiones). There is no internal reason whatever to justify the grouping together, at the end of the edict, of these formulae, more especially of the formulae for the exceptiones and stipulationes. And the arrangement seems all the more unreasonable, because the edicts which deal with the praetorian stipulationes (i. e. which direct their conclusion) and the stipulationes themselves are placed in entirely different parts of the Edictum and are thus completely detached from one another; and, further, because the exceptiones and the subject-matters to which they respectively belong are, in like manner, totally disconnected. It seems most natural to look to history for an explanation of so strange an anomaly, to the fact, namely, that this appendix contains the beginnings of the praetorian 'album', the tablet of formulae (with, of course, a number of subsequent additions) which was left in the very order in which, in the course of time, it had shaped itself. The absence, in this tablet of formulae, of the 'actiones', or forms of action, is explained by the fact that, at the time of the procedure by legis actiones, the praetor had no power in regard to the drawing up of the formulae for actions. The legis actiones, which were elaborated and developed by the pontifical jurisprudence, owed their publicity, not to the praetor, but to private compilations (the jus Flavianum, Aelianum; infra, p. 89). Subsequently, when the formulary procedure had come into use, the praetor published the formulae relating to actions as well, and arranged them in their proper place among the edicts. The older formulae, however, were left where they were and formed a special section—the appendix—of the album. This hypothesis assumes that the legal remedies grouped together in the appendix are all as old as the period of the legis actiones. That this is true of the interdicts and praetorian stipulationes can be asserted with sufficient certainty. As regards the exceptiones, the fact under discussion might perhaps be considered an argument in favour of the view that the insertion of an exceptio was possible, not indeed in the 'lege agere', but in the proceeding called 'per sponsionem agere' (the processual sponsio), which can be traced back to the period of legis actiones: v. Karlowa, *Der römische Civilprocess zur Zeit der Legisactionen* (1872), p. 101. In that case

other tablets gradually came into use, which contained the orders of the praetor concerning matters of law, i. e. the edicts. After the introduction of the formulary procedure (infra, p. 78) the 'actiones', or formulae for commencing an action, were also published on tablets. A new kind of Tables of Law thus came into existence side by side with the twelve bronze tables which were to be seen, not far away, in the forum Romanum, and on which was engraven the old jus civile of Rome. The praetorian tables, being only intended to last for a year, were simply made of wood painted white, for which reason they were called collectively 'album'. Nevertheless these wooden tablets were destined to outlast the bronze ones. For they represented those principles of law which metamorphosed and finally swept away the ancient laws of the decemviri. The whole body of edicts and formulae was called either 'album' (on account of its outward form) or 'the edict of the praetor', the formulae prescribed by the praetor (the publication of which was not, in the legal sense, an edict) being thus included with the edicts proper under the collective title of 'the Edict'.[3]

It is probable that, from an early date, it was the business of every new praetor, on taking office, to revise the tablets of formulae and put up new ones. For it was obvious that these tablets, being made of wood, would serve, at most, for the one year of office. What had been a traditional usage in the case of the formulae became, from the very outset, a matter of necessity in the case of the edicts. For the edict was only valid during the year of office of the praetor who issued it. Thus when the new praetor took office, he had to publish anew 'the Edict' as a whole: ut scirent

the placing of the formulae of exceptiones before those of sponsiones would not be accidental.--On this subject v. Wlassak, *Edict und Klageform* (1882), p. 22 ff.; Karlowa, *Röm. RG.* vol. i. p. 462 ff.

[3] The arrangement of the Edictum Hadrianum (cp. § 17) is based on the antithesis between the ordinary and extraordinary legal relief administered by the magistrate. The first main part of the Edict deals with the exercise of the 'jurisdictio', i. e. the ordinary form of legal relief; the second with the exercise of the 'imperium' (in the narrower sense of the term), i. e. the extraordinary form of relief administered by the magistrate in virtue of the imperative powers of his office (infra, § 56). Preceding the two main parts we have an introductory section dealing with the rules regulating judicial proceedings up to the appointment of the judex. Appended we have a concluding section dealing with execution and appeals. Then follows the appendix, discussed in note 2, dealing with interdicts, exceptiones and stipulationes, and, last of all, the aedilician edict. Lenel, *Edictum perpetuum* (1883), p. 12 ff.

cives, quod jus de quaque re quisque dicturus esset: l. 2 § 10 D. de O. J. (1, 2).

The edict which the praetor issues on taking office is called the 'edictum perpetuum'. It is intended to be valid for the whole term of his year of office. The opposite of the edictum perpetuum is an extraordinary order issued by the praetor during the year of office for such unforeseen occasions as may arise (prout res incidit). The edictum perpetuum or, as we shall in future call it, the 'edict' simply, is not a statute, nor is it originally even a source of law at all. For the very magistrate who had issued the edict might arbitrarily disregard it,[4] till a lex Cornelia (B. C. 67) made it illegal for a praetor to depart from his edictum perpetuum. But even then the validity of the edict expired with the year of office of the praetor who had issued it. The new praetor was not bound by the edict of his predecessor. He could repeat it or alter it, as he chose. It was, however, but natural that a custom should soon establish itself for each praetor, on taking office, regularly to repeat a large portion of the edict (the 'edictum tralaticium'), and confine himself merely to additions (nova edicta, novae clausulae[5]). Thus a regular system of judge-made law grew up in the praetorian court which, in addition to the statutory and customary law already in force, became, in point of fact, a most potent factor in the legal system.

The praetor peregrinus had to adjudicate in disputes between

[4] But in such a case his colleague might intercede. Cic. in Verrem, act. II. lib. I. 46 § 119: Tum vero in magistratu contra illud edictum suum sine ulla religione decernebat. Itaque L. Piso multos codices implevit earum rerum in quibus ita intercessit, quod iste aliter atque ut edixerat decrevisset. Cp. also § 120: Alias revocabat eos inter quos jam decreverat, decretumque mutabat, alias inter alios contrarium sine ulla religione decernebat ac proximis paullo ante decreverat.—Thus, though it was felt to be most improper (sine ulla religione) for a praetor to violate his own edict, still his legal right to do so was acknowledged, and was an exemplification of the nature of the magistrate's judicial power; like the sovereign power of the kings, which had devolved upon him, it was formally free and subject only to the limitations imposed by definite leges.

[5] By the time of Cicero the greater part of the praetorian edict had already become tralaticium, so that Cicero describes the praetorian law—which, of course, was not based on any lex—as a sort of customary law; Cic. de invent. II. 22, § 67: Consuetudinis autem jus esse putatur id quod voluntate omnium sine lege vetustas comprobavit; in ea autem jura sunt quaedam ipsa jam certa propter vetustatem; quo in genere et alia sunt multa, et eorum multo maxima pars, *quae praetores edicere consuerunt*. Cic. Verr. II. lib. i. 44 § 114: et hoc vetus edictum translaticiumque esse; 45 § 115: in re vetere edictum novum; 48 § 117: hoc (edictum) translaticium est. Mommsen, *Röm. Staatsrecht*, vol. i. (3rd ed.) p. 208, note 5.

aliens, and between citizens and aliens. In his judicial capacity, therefore, he possessed unlimited authority, and it was in virtue of this authority that he became the organ for shaping and working out the law for foreigners, the jus gentium (p. 67). In the edict of the praetor peregrinus the jus gentium thus acquired a written, fixed, and tangible form, and was, at the same time, placed in a position to exert a more powerful influence on the general development of Roman law, including the law as between citizens themselves. The praetor urbanus only had jurisdiction in disputes between Roman citizens. His edict dealt with Roman law in its entirety, i. e. both with the jus gentium (which of course came to be recognized as between Roman citizens as well) and the jus civile, in the narrower sense. The form in which the jus civile really attained to practical vitality in the praetor's court became clearly apparent in the edict of the praetor urbanus.

The praetor had no power to legislate, but he might grant or refuse an action. The old action of the civil law (legis actio) was confined within certain inflexible formulae which had been developed by the practice of the courts in conformity with the words of the statute. All the magistrate could do here was to grant or disallow the action (legis actio). Hence it was a most important event when, by the enactment of the lex Aebutia towards the middle of the second century B. C., the formulary procedure gained a footing even in proceedings between cives, that is, in proceedings governed by the jus civile. This procedure derived its name from the fact that, under it, the lodging of the complaint resulted in the magistrate's addressing to the judex a written precept (formula), containing an authoritative statement of the issue in dispute and of the principles on which the judex was to decide it (infra, § 49). The judex who heard the case (i. e. the private individual to whom the praetor, in accordance with traditional custom, referred the matter in litigation for trial and decision) was now far more dependent than formerly on the magistrate's instructions. He might be directed, under certain conditions, to disallow an action which the civil law admitted, or, on the other hand, to allow a claim of which the civil law knew nothing whatever. Again, as against the parties themselves, the position of the praetor was now one of much greater freedom than before. He might, on the one hand, refuse an action; on the other hand, he might, while granting an

action, subject his grant to such conditions as to make it in certain cases tantamount to a refusal. The entire procedure was by this means brought under the control of the praetor.

The rapid advance that the praetorian law soon began to make is thus explained. By the time of Cicero the praetorian edict had already become the leading organ for the development of Roman law.[6] Through the medium of the edict the new legal ideas and business habits asserted their influence in the administration of the law, and thereby determined the lines on which the evolution of Roman law should proceed.[7] The praetorian reform achieved its most essential result by working out that equitable law (the jus gentium) which was tending more and more to displace the harsh rigours of the old jus civile. The praetorian edict was the engine best fitted for effecting this reform—a task as important as it was difficult. As the edict was never valid for more than one year, it was a convenient instrument for giving new principles a trial. If the innovations did not answer, they could be dropped again at once. The praetors in general showed little taste for the sudden adoption of far-reaching general principles. They confined themselves rather, in the first instance, to laying down rules for a perfectly definite case, the conditions of which were clearly apprehended. The next praetor might then add some further clause to the edict of his predecessor, the third might take yet another step in advance, and so on. It was precisely on account of this objection to far-reaching generalizations that they always hesitated to strike out anything that had once found its way into the edict. They preferred the method of adding a second concrete case to the first, a method which had this further advantage that it secured accuracy of verbal expression—an important consideration, since the praetorian edict, like the statutes, was interpreted according to its letter. Thus there grew up in the edict a kind of code of private law, made up of a number of rules on the granting of actions, admission of pleas, and so on, and couched, moreover, in a style which was not exactly Ciceronian, nor even pleasant to read. Nevertheless it was by means of this code, with

[6] Cic. de legib. I. 5. 17: Non ergo a praetoris edicto, *ut plerique nunc*, neque a XII tabulis, ut superiores, sed penitus ex intima philosophia hauriendam juris disciplinam putas.

[7] Cp. Pernice, *ZS. d. Sav. St.*, vol. xx. p. 128 ff.

all its old-fashioned jargon and cumbrous phraseology, that the wisdom, experience, and foresight of bygone ages were handed down from generation to generation. It was a code which combined conservatism with a ready susceptibility of change, thus standing at the same time firmly rooted in the experience of the past and the life and movement of the present.

Praetorian law, in the shape it assumed in the edict, was not, strictly speaking, *law*, but the power involved in the right to allow or disallow actions and other legal remedies virtually raised it to the position of law. Thus we find Cicero declaring that even at his time the edict was felt to be a kind of law.[8] The praetorian law, being a law made by officials ('jus honorarium'), was opposed to the jus civile, or law in the strict and proper sense of the term, the law made by the people. Thus both the jus civile[9] and the jus honorarium[10] contained elements of jus gentium, but in the jus honorarium the influence of the jus gentium predominated. The praetorian edict was, in the main, the instrument by means of which the free principles of the jus aequum gained their victory over the older jus strictum. Though the praetorian law may at first have served the purpose of merely giving fuller effect to the jus civile (juris civilis adjuvandi gratia), and then of supplementing the jus civile (juris civilis supplendi gratia), nevertheless, in the end, borne along by the current of the times, it boldly assumed the function of *reforming* the civil law (juris civilis corrigendi gratia).

[8] 'Qui plurimum tribuunt edicto, praetoris edictum *legem annuam* dicunt esse' (in Verrem, II. 1. 42).

[9] We are here using the term jus civile in its wider sense as signifying the positive law of Rome simply, the law which applied to Roman citizens, whether it be jus civile in the narrower sense (of law peculiar to the Romans) or jus gentium, i. e. law originally only applicable to aliens, but extended by usage to Roman citizens. When opposed to jus honorarium, jus civile means all such portions of the law of Rome applying to cives Romani as were law in the strictest sense of the term, being based on statutes enacted by the Roman people or on Roman customary law. The difference between jus civile (in the narrower sense) and jus gentium is a difference in regard to the contents of the legal rules, the rules of the jus civile being peculiar to the Romans, while those of the jus gentium apply equally to foreign nations or are common to mankind. On the other hand, the difference between jus civile (in the wider sense) and jus honorarium is a difference in regard to the source from which the rules derive their authority, those of the former being based on statute or custom, those of the latter on the official authority of the magistrate.

[10] i. e. the law which is only law in virtue of the edict.

§ 16. *The Dual System of Law.*

The development of the jus honorarium resulted in the establishment of a dual system of law in Rome. In every department of the law, but more particularly in private law and in civil procedure, an antithesis arose between law in the strict and proper sense (jus civile) and law made by officials (jus honorarium).

Thus, according to the jus civile a res mancipii (res mancipi) could not be validly alienated by act of the parties without the form of mancipatio. Part of the ceremonial of mancipatio consisted in 'manu capere', the taking hold of the thing by the purchaser (supra, p. 48). No doubt this 'taking with the hand' had originally a distinct significance, its object being to enable the purchaser to get actual control over the thing. But gradually as the jus civile was developed by the 'interpretatio', the 'manu capere' dwindled into an empty form. The mancipatio as such ceased to give possession of the thing mancipated and its effect was only to pass ownership. By the civil law the transfer of possession (traditio) had become quite immaterial as far as the transfer of ownership was concerned. The praetor however reversed the position by making the traditio the essential feature in the transaction in regard even to res mancipi. Where a res mancipi—such as a slave or a fundus Italicus—was sold and informally delivered into the possession of the purchaser, the latter did not become owner according to the civil law. But if the matter came before the court, the praetor would treat him just as if he were the true owner. The praetor could not make a man who had acquired a res mancipi by mere traditio full civil law owner (ex jure Quiritium), for the praetor had no power to alter the legal *force* of the civil law. But he could grant actions and defences to such persons as he thought fit to protect, since the practical *application* of the civil law was under his control. Though a person who had acquired possession of a thing by mere traditio was not the formal owner, still the effect of the praetorian action and defence (actio, exceptio) was that he held the thing 'in bonis', so that no one could deprive him of it. Thus to the civil law rules of ownership the praetor opposed another set of rules, the praetorian rules, and to the quiritary ownership of the jus civile he opposed another kind of

ownership, where the thing was said to be 'in bonis', the so-called 'bonitary ownership'. (Cp. infra, § 62.)

According to the civil law again a servitude—that is, a limited right of user in respect of a thing not one's own, e. g. a usufruct or a right of way—could only be created by means of certain definite legal forms. The praetorian law, on the other hand, allowed a servitude to be created by a so-called quasi traditio servitutis; that is, it was satisfied if one party gave the other, without any form, permission to exercise the right of user in question (infra, § 69 IV). In the civil law again a pledge, in the proper sense of the term, was an unknown transaction. If a creditor was to have real security, he had to be constituted owner of the thing pledged. The praetor however introduced a right of pledge as a distinct right apart from ownership. He granted the creditor a real action on the ground of a simple agreement with the debtor that a particular thing should serve as a pledge for the debt (infra, § 72). In this way the jus honorarium brought about a fundamental reform in the rules, not only as to ownership, but also as to jura in re aliena.

Where a juristic act was obtained from a person by means of threats (metus) or by fraud (dolus), the civil law treated the act, as a rule, as valid, notwithstanding the threats or the fraud. The praetor however took account of the metus or dolus in all cases by granting the aggrieved party an action or a defence according to circumstances. The civil law and the praetorian law thus took opposite views of a liability incurred by means of a promise which, though made in due legal form, was in fact obtained as a result of threats or fraud. The civil law regarded such a promise, as a rule, as perfectly valid; according to the praetorian law it was always invalid. There were other facts again—such as an informal agreement of release (pactum de non petendo)—which the debtor could not rely on as a ground of discharge according to the civil law, because the civil law treated them on principle (like metus and dolus) as irrelevant in themselves; whereas the praetorian law, on the contrary, held that they constituted, in themselves, a relevant defence. Moreover, while there were, on the one hand, certain facts which the praetor treated as grounds for discharging an obligation, there were others again which, by virtue of the praetor's jurisdiction alone, came to be treated as *creating* an obligation. That is to say, by granting an action, the praetor gave legally

binding force to certain transactions—such as the constitutum debiti, or informal promise to pay a subsisting debt[1]—which were not actionable according to the civil law.

Let us take another example. The praetor had no power to make a man heres who was not heres by the civil law. But his office gave him control over the so-called 'bonorum possessio'; that is to say, it lay with him, in the exercise of his jurisdiction, to determine who should be put into possession of a deceased person's property. The practice of the praetors in awarding or refusing the possession of an estate thus became the foundation on which a new system of hereditary succession (which of course only gave rise to bonitary rights) was built up, viz. the praetorian system of bonorum possessio (infra, § 110).

These are merely some of the most salient points illustrating the antithesis under discussion.[2] But they will suffice to convey some notion of the far-reaching influence of the jus honorarium as an engine of reform. The jus honorarium was gradually developed into a complete legal system. It confronted the system of the jus civile as a compact whole, as a new body of private law made by officials, in which the legal ideas of the jus gentium found expression.

It must not however be supposed that any part of the jus civile was abolished. The legal force of the jus civile remained absolutely untouched. The only way the jus honorarium could be given effect to was through the medium of legal procedure, i.e. by actiones and exceptiones.[3] Jus civile and jus honorarium existed side by side. It is to this dualism that we must attribute the high pitch of artistic perfection to which the Romans carried the technique of their law. The two bodies of law, the jus civile, or law in the strictest sense (which it was always possible to fall back upon, if the justice of any particular case seemed to require it), and the jus honorarium, the law declared and acted on by the courts, were welded into a great unity covering a rich multiplicity of detail—a complicated, but orderly structure, operating with the subtlest of means, and demanding for its complete mastery the fullest exercise of the intellectual faculties. The strength and artistic skill dis-

[1] Cp. § 84, II.

[2] As to the development of the praetorian law of civil procedure, see infra, § 49.

[3] In exceptional cases by in integrum restitutio, infra, § 56 iii.

played by the praetorian edict are the immediate source of the strength and artistic skill which characterize the scientific jurisprudence of the early Empire.

It was never attempted to reform the Roman civil law at one stroke by the rough method of legislation. Nor was any such attempt necessary. For the praetor had ready to hand, in the established practice of his court, an instrument powerful enough to carry the law, on the basis of the jus civile itself, to a higher plane of development, and to adapt the civil law to the legal requirements of everyday life in such a way as to produce what was in fact a new law, the civil law of the future.

CICERO de offic. I. c. 10 §§ 32, 33: Jam illis promissis standum non esse quis non videt, quae coactus quis metu, quae deceptus dolo promiserit? quae quidem pleraque jure praetorio liberantur, nonnulla legibus.

L. 5 C. de pactis (2, 3) (Imp. ANTONINUS): Creditori tuo si partem pecuniae exsolvisti, de parte vero non petenda inter te et eum convenit ea obligatione partim jure civili partim honorario liberatus es.

GAJUS I. § 54: Cum apud cives Romanos duplex sit dominium, nam vel in bonis vel ex jure Quiritium vel ex utroque jure cujusque servus esse intellegitur.

L. 1 pr. D. quibus modis ususfr. (7, 4) (ULPIAN.): parvi refert utrum jure sit constitutus ususfructus an vero tuitione praetoris.

§ 17. *The Edictum Hadrianum.*

The development of the praetorian edict reached its climax in the last century of the Republic. In the main the problem had now been solved. It was universally felt that the jus honorarium, fully matured as it was (it was already for the most part 'tralaticium', each praetor handing it on to his successor in the form in which he found it), was now entitled to rank as a second great power, equal in importance to the jus civile. But the constitutional changes which had gradually been accomplished soon opposed a barrier to the further creation of law by the praetor. For we must bear in mind that the praetor's jus edicendi was the outcome of that autocratic power which was peculiar to the ancient *republican* magistracies. The rising imperial power could not permanently tolerate any rival independent authority. But, as in all other

branches of public life, so here the old forms were preserved, though in substance the way was being prepared for the new monarchical ideas. The far-seeing genius of Hadrian, at this point, recognized and, at the same time, gave effect to the necessary results of the altered political circumstances. It was never, from the outset, considered anything very abnormal for the supreme power in the State to instruct the magistrates as to how they should exercise their official power.[1] Thus some leges, and subsequently (more especially in the first centuries of the Empire) a series of senatusconsulta,[2] had laid down instructions which were binding on the praetors in the administration of justice and the granting or refusing of rights of action, and in so doing had indirectly contributed to determine the contents of the praetorian edict. It was from this fact that Hadrian took his cue. The time had come to prescribe to the praetor the *entire* contents of his edict. The regular reissue of the edict by the magistrate had already sunk to a mere matter of form. It would have been inconsistent with the actual position occupied by the princeps and praetor respectively, if the latter had ventured to make important alterations in the edict without the assent of the former. And, moreover, if the praetor had attempted to make any change in his edict which the emperor did not approve, the latter was legally empowered to disallow it by virtue of his jus intercedendi. The result was that the praetorian edict became stereotyped and barren. Its task was done. All that remained was to cast it into a final shape and, at the same time, to define, in a legal form, the relations subsisting between the imperial power and the edict. With a view to this purpose, Hadrian (before the year 129 A.D.) instructed the great jurist Salvius Julianus definitively to revise the edicts of the praetor urbanus and praetor peregrinus, as well as the market-regulations (as to the liability of the vendor for faults, &c.) contained in the edict of the curule

[1] See, for example, the lex (probably the lex Aelia Sentia, 4 A. D.) which directed the praetor in dealing with property left, at their death, by certain dediticii (such namely as had become dediticii by manumission) 'ita jus dicere, judicium reddere, ut ea fiant quae futura forent, si dediticiorum numero facti non essent'. (*ZS. der Sav. St.*, vol. i. p. 97.)

[2] e. g. the Senatusconsultum Vellejanum, Trebellianum, Macedonianum; cp. Schlesinger, *ZS. für RG.*, vol. viii. p. 227, note 44; Karlowa, *Röm. RG.*, vol. i. p. 629; Krüger, *G. d. Quellen d. röm. R.*, p. 85. As early as Livy (41. 9) we find mention of a senatusconsultum of this kind dating from the Republic (177 B. C.).

aediles. By order of the emperor, the whole was then ratified by a senatusconsultum. This is the so-called Edictum Hadrianum or Julianum.[3] The edict issued by the provincial governors—praesides provinciarum—in the administration of justice (edictum provinciale) was similarly dealt with and finally reduced to a definite form. Thus the imperial power—the effect of which was extended to the senatorial provinces by means of the senatusconsultum—rose supreme above the magistracies, appropriating, as its own, the contents of the edict with its rules on the administration of justice. Formally, however, the change was slight. The magistrate continued to administer justice and the edictal law was still, in theory, derived from his official power as its source. The praetor and, in the provinces, the praeses provinciae continued, on taking office, to issue their edicts and the contents of the edicts were still jus honorarium, i. e. law which existed only in virtue of the official authority of the magistrate entrusted with the administration of justice. The jus honorarium had not been converted into jus civile, because the contents of the edict had not been declared law for the whole empire.[4] The semblance of the power of the old republican magistrates remained as heretofore. But the emperor and senate had, by means of their legislative authority, compelled the magistrate

[3] Already towards the close of the Republic the two praetorian edicts coincided in all essentials, the praetor urbanus having likewise admitted the freer jus gentium to his edict. As a rule, the contents of the edicts issued by the provincial governors also corresponded with the urban edicts. In proof of both these facts we may quote Cicero (ad Att. 6. 1. 15): dixi (viz. in the edict for his province) me de eo genere ad edicta urbana accommodaturum. Cicero was able to refer to the edicta in the plural, because the contents of both the urban edicts were already thought of as being substantially the same.

[4] The senatusconsultum would have converted the edictal law into jus civile, had it directly enacted that the contents of the edict should be law for the whole empire; for a senatusconsultum had 'legis vicem' under the empire (§ 19) and was thus a source of jus civile. But the antithesis between the magisterial law as jus honorarium and the jus civile was maintained. It follows that the provisions of the imperial enactment which was ratified by the senate were referable to the domain, not of private, but of public law. In other words, the effect of this enactment was not, directly, to convert the contents of the edict into law (viz. private and procedural law) for the *subjects* of the empire, but rather to determine its contents for the *magistrates*, and to bind them by public ordinance to issue the edict in the form in which it was thus arranged and no other. Cp. M. Wlassak, *Kritische Studien zur Theorie der Rechtsquellen*, 1884, pp. 14, 15; Krüger, *loc. cit.* (v. note 2), p. 91. As to the date when the Edictum Hadrianum was composed, cp. Krüger, p. 86; Bremer, in the *Göttinger Gelehrte Anzeigen*, 1889, p. 432 note.

to issue the edict in the new form as finally established and in no other. In substance, therefore, it was not the will of the magistrate, but the will of the emperor that determined the contents of the magisterial edict. Thus, if it appeared that any provision of the edict was ambiguous, it was necessary to appeal to the emperor and to obtain a decision of the matter by means of an imperial rescript.[5] In like manner it was reserved for the emperor to have the edict, when necessary, supplemented. The edict of the praetor had become unchangeable—an edictum perpetuum in a new sense of the term. In the subsequent stages of its development, the edictal law appears in the form, not of praetorian, but of imperial law.

The praetorian law was finished. The time had come for a fresh power to enter on the scene, in order to solve a new problem which had now arisen. This power was Roman Scientific Jurisprudence.

L. 2 § 10 D. de orig. juris (1, 2) (POMPONIUS): Eodem tempore et magistratus jura reddebant, et, ut scirent cives quod jus de quaque re quisque dicturus esset seque praemunirent, edicta proponebant. Quae edicta praetorum jus honorarium constituerunt. Honorarium dicitur, quod ab honore praetoris venerat.

ASCONIUS in Cicer. orat. pro Cornelio: Aliam deinde legem Cornelius, etsi nemo repugnare ausus est, multis tamen invitis tulit: ut praetores ex edictis suis perpetuis jus dicerent; quae res cunctam gratiam ambitiosis praetoribus, qui varie jus dicere solebant, sustulit.

L. 7 § 1 D. de just. et jure (1, 1) (PAPINIAN.): Jus praetorium est quod praetores introduxerunt adjuvandi vel supplendi vel corrigendi juris civilis gratia propter utilitatem publicam.

L. 8 eod. (MARCIAN.): et ipsum jus honorarium viva vox est juris civilis.

The following passage may serve to illustrate the contents of the edict. It deals with the so-called in integrum restitutio propter absentiam, i.e. the rescission of an injury which a person has suffered, by operation of the law, in consequence of his not having asserted his rights in time.

L. 1 § 1 D. ex quib. caus. maj. (4, 6): Verba autem edicti talia sunt: Si cujus quid de bonis, cum is metus aut sine dolo malo reipublicae causa abesset, inve vinculis servitute hostiumque pote-

[5] It is only from the time of Hadrian that the emperors begin to interfere to any perceptible degree in the administration of justice by means of their rescripts. Cp. Karlowa, *Röm. RG.*, vol. i. p. 630; Krüger, *loc. cit.*, p. 94; Bremer, *loc. cit.*, p. 430, and infra, § 19, note 2.

state esset, posteave non utendo deminutum esse,[5] sive cujus actionis eorum cui dies exisse dicitur; item si quis quid usu suum fecisset aut quod non utendo amissum sit,[5] consecutus, actioneve qua solutus ob id quod dies ejus exierit, cum absens non defenderetur inve vinculis esset secumve agendi potestatem non faceret, aut cum eum invitum in jus vocari non liceret neque defenderetur, cumve magistratus de ea re appellatus esset sive cui per magistratus[6] sine dolo ipsius actio exempta esse dicetur: earum rerum actionem intra annum quo primum de ea re experiundi potestas erit, item si qua alia mihi justa causa esse videbitur, in integrum restituam, quod ejus per leges, plebis scita, senatus consulta, edicta, decreta principum licebit.

The passage shows very clearly the various clauses which have been inserted one after the other, the concluding clause—a most comprehensive general clause—being certainly the latest. It is to be observed, also, that the praetor expressly avows his magisterial discretion to be limited by statutory law, but does not mention customary law.

See, on the whole subject, especially: O. Lenel, Das Edictum Perpetuum (1883); Bruns, Fontes juris Romani antiqui, ed. 6 (1893), p. 202 ff.

§ 18. *Roman Jurisprudence.*

The beginnings of Roman jurisprudence[1] date from the pontifices, who acted as skilled legal advisers in the court, first of the king, then of the consul, lastly of the praetor. Their science of law was closely bound up with their science of religion and astronomy. Theirs was the knowledge of the jus sacrum and the calendar, they alone could tell the dies fasti and nefasti, i. e. the days on which an action at law might or might not be commenced. It was a consequence of their functions as consulting assessors in the law courts that the knowledge, control, and development of the formulae relating to actions (legis actiones) and to juristic acts came to rest entirely with them. Their science was the science of the letter of the law and of its technical application, interpretation, and utilization for purposes of the forms of actions and of juristic

[5] Cp. Lenel, *Edictum perpetuum*, p. 96.

[1] On early Roman jurisprudence, see P. Jörs, *Römische Rechtswissenschaft zur Zeit der Republik* (1888); F. P. Bremer, *Jurisprudentiae antehadrianae quae supersunt* (supra, p. 18). The latter work contains, besides the texts of the jurists, the whole of the extant materials relating to the separate writers, together with suggestive observations of the learned author's.

acts (interpretatio, supra, p. 56). From the very outset the legal method of the Romans was characterized by its careful attention to, and consequent mastery of, form, so that the idea was never sacrificed to the form, the form being rather utilized as a means for giving effect to the idea. In consequence of the development of forms at once strict and elastic for the conduct of legal affairs, we are able to discern, even in the work of the Roman pontiffs, some early indications of that classical style—so different from the Cyclopean style of the older German law—in which the fabric of Roman law was built up. But the shaping of this science was exclusively confined to the college of pontifices, and its knowledge was preserved and handed down, within the same limits, by tradition and by instruction of the new members who joined. Moreover, the precedents—i. e. the early legal opinions (responsa, decreta) of the college, which formed the basis and norm of the existing practice—were preserved in the archives of the pontifices, and to these archives none but members of the college had access. Thus the business of interpretation, which was, of course, in each separate case, decisive of the form of the action or juristic act, was confined to a few, and the pontifical jurisprudence came positively to be regarded as a secret science, exclusively reserved for the pontifical college, and as constituting, at the same time, a powerful weapon in the hands of the patricians (to whom the pontifices belonged) in their struggle with the plebeians. No wonder, then, that the publication by Flavius (304 B. C.) and Aelius (about 204 B. C.) of the legis actiones—i. e. of the formulae for actions in the shape which the pontifices had given them (the so-called 'jus Flavianum' and 'jus Aelianum')—was regarded as a great popular act.[2] Accordingly it marked an important turning-point, when Tiberius Coruncanius (about 254 B. C.), the first plebeian pontifex maximus, proclaimed his readiness to give information to anybody on legal questions. True, the pontifices had, before this time, given information on inquiry, not however to every one, but only to magistrates and to persons who, as parties to an action, were practically concerned in some question of law; in

[2] The promulgation of the calendar had already been effected by the decemviri. And the definitive ascertainment of the rules of the jus civile, by means of the decemviral legislation was, in itself, a popular act, because it was thereby *publicly* established what the existing law actually was.

other words, the information vouchsafed only applied to a particular case; it was fragmentary and afforded no insight into the system as a whole. The announcement made by Tiberius Coruncanius meant that he was prepared to go further and answer questions addressed to him by persons whose interest was purely theoretical, in other words, questions put by those whose object it was to know the law and to study the existing jus civile. The knowledge of law was to be opened up to all. Here, then, we have the first beginnings of a system of public legal instruction and—as its necessary consequence—the first beginnings of a juristic literature. The same Aelius whom we have just mentioned, surnamed 'Catus', 'the cunning' (Sextus Aelius Paetus Catus, Consul 198 B. C.), had already composed a work, called the 'commentaria tripertita', in which, not content with making a mere collection of formulae, he offered a commentary on the Twelve Tables and the formulae for actions and juristic acts. These 'commentaria' are, it is true, nothing more than explanatory or exegetic notes, but still they represent the first attempt to set forth the pontifical jus civile in a literary form; they are the first law book, the 'cradle of legal literature'.[3] From this time onward the technical knowledge of law passed more and more out of the hands of the pontifices and became an ingredient in national culture.[4] At the same time the influence of Greek literature, and, more especially, the scientific methods of the Stoic philosophy, operated as a powerful and ennobling stimulant. The idea now suggested itself of casting the hard materials of law into a suitable artistic form. Thus, at an early date, we find M. Porcius Cato, the younger (who died 152 B. C.), making a conscious attempt to work out general principles of law (regulae juris),[5] i.e. to trace in the raw material of legal rules, as presented by history, the underlying legal idea, to shape the statue from the rough block of marble. The most distinguished of all these 'veteres' was Qu. Mucius Scaevola, the younger, pontifex

[3] Pomponius, l. 2. § 38 D. 1, 2: qui liber veluti cunabula juris continet. Cp. Jörs, *loc. cit.*, p. 104 ff.

[4] Qu. Mucius Scaevola (whom we shall presently have occasion to mention) once declared to the orator Servius Sulpicius who consulted him on a legal question: 'turpe esse patricio et nobili et causas oranti jus in quo versaretur ignorare.'

[5] e. g. the 'regula Catoniana': quod, si testamenti facti tempore decessisset testator, inutile foret, id legatum, quandocumque decesserit, non valere. l. 1 pr. D. de reg. Caton. (34. 7); Jörs, *loc. cit.*, p. 289 ff.

maximus. About 100 B.C. he wrote his great treatise on the jus civile, in eighteen books, a work of wide and enduring fame. In this treatise the positive private law was, for the first time, set forth in systematic order, i.e. arranged and classified according to the nature of the subjects dealt with. Scaevola's system remained the foundation for the labours of his successors. He abandoned the traditional legal arrangement of simply following the words of statutes or of the formulae relating to procedure or juristic acts, and adding explanatory notes. Nor did he confine himself, like earlier writers, to the discussion of isolated cases or questions of law. He arranged his work according to the subject-matter with which the several rules of law were concerned, and in which they were, so to speak, focussed. He was the first to determine, in clear outline, the nature of the legal institutions (will, legacy, guardianship, partnership, sale, hiring, &c.), and their various kinds (genera). He made the first attempt to set out general legal conceptions, i.e. those elements which go to make up the checkered and, to all appearances, boundless mass of concrete facts. This is the secret of the great significance and enormous success of his work. His achievements rendered it possible, for the first time, to survey private law rising as a whole beyond all the complexities of detail. A mere knowledge of law was beginning to develop into a legal science.[6]

L. 2 §§ 6. 7 D. de orig. jur. (1, 2) (POMPONIUS): Omnium tamen harum (legum XII tab.) et interpretandi scientia et actiones apud collegium pontificum erant, ex quibus constituebatur, quis quoquo anno praeesset privatis.—Postea cum Appius Claudius proposuisset et ad formam redegisset has actiones, Gnaeus Flavius scriba ejus, libertini filius, subreptum librum populo tradidit, et adeo gratum fuit id munus populo ut tribunus plebis fieret et senator et aedilis curulis. Hic liber, qui actiones continet, appellatur jus civile Flavianum.—augescente civitate, quia deerant quaedam genera agendi, non post multum temporis spatium Sextus Aelius alias actiones composuit et librum populo dedit qui appellatur jus Aelianum.

§ 35 eod.: ex omnibus qui scientiam (juris civilis) nancti sunt ante Tiberium Coruncanium publice professum neminem traditur: ceteri autem ad hunc vel in latenti jus civile retinere cogitabant solumque consultatoribus vacare potius quam discere volentibus se praestabant.

[6] On Scaevola's jurisprudence, v. Krüger, *G. d. Quellen des röm. R.*, pp. 59, 60; Burckhardt, *ZS. der. Sav. St.*, vol. ix. p. 286 ff.

§ 41 eod.: Quintus Mucius (Scaevola), Publii filius, pontifex maximus, jus civile primus constituit generatim, in libros decem et octo redigendo.

The chief business of a Roman jurist—apart from the drawing up of formulae for juristic transactions (cavere)—was to give answers to legal questions (respondere). With this he would combine the practice of teaching law and writing on legal subjects.

The authority of the ancient pontifical responsa rested on the position occupied by the college of pontifices, which appointed one of its members every year to give opinions on questions of private law (constituebatur quis quoquo anno praeesset privatis). The result was that the pontifical responsa were held to be, in point of fact, binding on the judges.[7] Since the close of the Republic, however, and with the spread of juristic learning, it had become a frequent practice for persons other than members of the college of pontifices freely to give 'responsa', though, of course, responsa of this kind were devoid of binding authority. It was clear that such a practice must tend to prejudice the prestige of the responsa and of jurisprudence in general. On the other hand, a return to the old monopoly of all legal learning by the pontifices was out of the question. The Emperor Augustus therefore devised a different remedy. With a view to restoring the authority of professional legal opinions, and at the same time, very probably, to throwing the imperial power into fresh relief, he ordered that in future all responsa should be given ex auctoritate ejus (principis),[8] i. e. with the sanction of the emperor. As Augustus was at the same time pontifex maximus, this ordinance of his might be interpreted as involving both a revival and a reform of the old authoritative responsa, which the rise of the new practice had not, of course, done away with. Through the medium of the emperor it was now feasible for persons who were not pontifices to deliver *authoritative* responsa. Henceforward the pontifical college ceased to play any part in the shaping of the civil law, and the princeps in conjunction with scientific jurisprudence (which had now definitely passed into the

[7] The delivery of the pontifical responsum virtually decided the suit, though the pronouncement of the verdict by the judge had to follow as a matter of form. Cp. Mommsen, *Röm. Staatsrecht*, vol. ii. (3rd ed.) pp. 46, 48.

[8] Literally, 'under the guarantee of the emperor.' Cp. A. Pernice in the *Juristische Abhandlungen*, Festgabe für Beseler (Berlin, 1885), p. 70.

hands of laymen) assumed, to an ever increasing extent, the lead in the further development of the law.

From the reign of Tiberius onward the business of giving responsa ex auctoritate principis was invariably carried on in a form which that emperor seems to have been the first to settle definitely. Henceforward it is the usual practice for the emperor to confer the 'jus respondendi' (jus publice, populo respondendi) on certain distinguished jurists. The jus respondendi is the privilege of delivering opinions *binding on the judge*, both on the magistrate and the appointed judex privatus. The opinion of a privileged jurist was required to be delivered in writing and sealed, and if a party submitted such an opinion in due form, the judge was bound to decide accordingly, unless, indeed, a conflicting opinion of another privileged jurist was also submitted. At first it was only the responsum expressly delivered by the jurist in reference to a particular action that possessed such authoritative force. But it soon became the practice to extend the same authority to previous responsa, i. e. to such as no longer existed in their official form (written and sealed), but were only to be found in the literature of the responsa (the collections of responsa). A rescript of the Emperor Hadrian expressly sanctioned this practice.

The responsa prudentium, i. e. the opinions of the privileged jurists, had become a kind of source of law, and their force, as a source of law, was beginning to extend to juristic literature in general.

L. 2 §§ 48. 49 D. de orig. jur. (1, 2) (Pomponius): Massurius Sabinus in equestri ordine fuit et publice primus respondit: posteaque hoc coepit beneficium dari, a Tiberio Caesare hoc tamen illi concessum erat. Et, ut obiter sciamus, ante tempora Augusti publice respondendi jus non a principibus dabatur, sed qui fiduciam studiorum suorum habebant, consulentibus respondebant: neque responsa utique signata dabant, sed plerumque judicibus ipsi scribebant, aut testabantur qui illos consulebant. Primus divus Augustus, ut major juris auctoritas haberetur, constituit ut ex auctoritate ejus responderent: et ex illo tempore peti hoc pro beneficio coepit.

Gaj. Inst. I § 7: Responsa prudentium sunt sententiae et opiniones eorum quibus permissum est jura condere. Quorum omnium si in unum sententiae concurrunt, id quod ita sentiunt legis vicem obtinet; si vero dissentiunt, judici licet quam velit sententiam sequi; idque rescripto divi Hadriani significatur.

Roman jurisprudence was thus placed in a position of command-

ing influence. It only remained to be seen whether it would be able to utilize the influence it had acquired.[9]

At the outset, a conflict arose between the jurists themselves. Two rival law-schools sprang up, the Sabinians and Proculians, the Sabinians being the followers of C. Atejus Capito, the Proculians the followers of M. Antistius Labeo. Both Capito and Labeo lived under Augustus. The Sabinians derived their name from Masurius Sabinus, an adherent of Capito, who lived in the reign of Tiberius. The Proculians derived their name from Proculus, who lived in the reign of Nero and was acknowledged as the leader of the disciples of Labeo. Sabinus was succeeded by C. Cassius Longinus, and it is after him that the Sabinians are sometimes called Cassiani.

It is impossible, at the present day, to determine, with any certainty, what the essence of this divergence of schools was. But there would seem to be good warrant for one statement, at least, viz. that the influence exercised by Labeo extended in a large measure to the Sabinians. Of the two great jurists of the Augustan age Labeo was beyond doubt the greater. The large number of quotations from his works which our Corpus juris has preserved bear testimony, to this day, to his extraordinary influence on scientific jurisprudence. Capito's name, on the other hand, has practically disappeared from Justinian's collection. Labeo is the author of various new classifications, divisions, and definitions—such as the definition of dolus malus, of excusable error, of appurtenances—which helped to throw light on the theory and practice of law and to place them on a firmer footing. He is probably the author of the division of all actions into actiones in rem and actiones in personam (infra, § 52)—a division which, to this day, affects all juristic thought in matters of private law. As in the domain of scholarship—for he was an accomplished scholar and thoroughly imbued with the Greek and Roman culture of his age—so also in that of jurisprudence, he was an 'analogist',[10] i. e. his method

[9] On the subject under discussion, v. especially A. Pernice, *Marcus Antistius Labeo, Das römische Privatrecht im ersten Jahrhundert der Kaiserzeit*, vol. i. (1873) pp. 14 ff., 81 ff.; Karlowa, *Röm. RG.*, vol. i. pp. 657 ff., 677 ff., 707 ff., 733 ff.; Krüger, *G. der Quellen u. Litteratur des Röm. R.* (1888), pp. 109 ff., 126 ff.; W. Kalb, *Roms Juristen nach ihrer Sprache dargestellt* (1890).

[10] Cp. M. Schanz in the *Philologus* (1883), p. 309 ff.; *Analogisten u. Anomalisten im römischen Recht*; and, on the same subject, in the *Hermes*, vol. xxv. (1890) pp. 53, 54. The author dwells on Labeo's method of

was to trace all that was normal, all that was united by a common underlying conception, in order that, by so doing, he might bring positive law under the control of the art of dialectics. He was well qualified, therefore, to perform a useful task in his time. For there were many principles of law floating, as it were, in the air, generally recognized and already universally adopted, but still, maybe, waiting for some one to give them direct utterance. Labeo was the man to grasp them boldly and firmly, to cast them into shape, to give them a terse and vigorous expression which was sometimes, perhaps, too terse, because too sweeping. There was a book of Labeo's in which he had collected what he called the 'probabilia', i. e. a number of such 'legal principles of universal validity' taken from actual life ('libri pithanon'). This book long continued to exercise a vast practical influence, and it was with a view to softening the exaggerated point of the principles there formulated that Paulus, as late as two centuries after, wrote a critical commentary on Labeo's work, testing his principles in the light of the actual facts of particular cases, and more especially in the light of the concrete intention of the parties (the 'quod actum est'). But it was precisely the terseness and vigour of Labeo's definitions and principles that very naturally carried his contemporaries away. The power of definiteness and logical precision were on his side and could not fail to ensure his success. Like Capito, he does not seem to have founded a regular school himself. They both gave legal instruction, but apparently after the traditional republican fashion of old distinguished Romans, whose practice it was to give public answers to questions in the presence of their pupils, occasionally arguing with them, but very rarely imparting regular private tuition in a series of connected lectures. Sabinus, who (we are told) earned his living by giving legal instruction,[11] seems to have been the first to originate a school of law. It is probable that, at the same time, the method of instruction by means of a corporate organization, such as had been in vogue among the Greek schools of philosophy, found its way into Rome. These schools

dealing with questions of scholarship, and very happily points to certain conclusions to which it helps us in endeavouring to characterize Labeo's intellectual disposition.

[11] L. 2. § 50 D. de orig. juris (1, 2) (POMPONIUS): huic (Sabino) nec amplae facultates fuerunt, sed plurimum a suis auditoribus sustentatus est.

were societies of which the professor was the president and the pupils the members, each pupil being bound on entering to pay a subscription. The presidency of the school passed by a legal succession from one professor to the other.[12] In opposition to the school of Sabinus, a second school sprang up, organized after the same fashion. This was the school of Proculus. After their respective founders the members of the former called themselves Sabinians, those of the latter Proculians. Tradition subsequently traced back the opposition between the schools to the opposition between the two famous jurists of the age of Augustus: Labeo and Capito. Nevertheless there were many eminent jurists who did not belong to either school and who had learned law in the old fashion, as 'auditores' of some distinguished jurist. But as long as the opposition between them lasted, the organized societies of Sabinus

[12] von Wilamowitz-Möllendorff has proved in his *Philologische Untersuchungen* (edited with Kiessling), vol. iv. (1881) p. 263 ff., that the Greek schools of philosophy were thus organized as corporate societies. Cp. Diels in *Philosophische Aufsätze*, Ed. Zeller gewidmet, 1887, p. 239 ff. When the students took their meals together, they were bound to conform to the νόμοι συμποτικοί or 'drinking rules' laid down by the professor as president of the society. Cp. Pernice, *ZS. der Sav. St.*, vol. vii. p. 92. The circumstances which seem to point to the conclusion that the Sabinian and Proculian schools were similarly organized as corporate societies are the following. First, the fact that Sabinus was in the habit of taking fees from his pupils; secondly, the circumstance pointed out, some time ago, by Bremer in his *Rechtslehrer und Rechtsschulen im römischen Kaiserreich* (1868), p. 68 ff., viz. that Pomponius (l. 2. § 51 ff., D. 1. 2), in enumerating the heads of the Sabinian and Proculian schools, invariably uses the term 'successit', which he avoids in enumerating the jurists of the Republic—an expression which would seem to show that, in the case of the Sabinians and Proculians, it was really a question of legal succession to the presidency of the school. Again, the words used by Ulpian in l. 1. § 5 D. de extraord. cogn. (50, 13) in regard to the fee payable to the professor: honor qui in ingressu *sacramenti* offerri debuit (cp. on this point Bremer, *Rechtslehrer*, pp. 5, 6; Karlowa, *Röm. RG.*, vol. i. p. 673, note 1), might contain a reference to such an organization. For sacramentum is the equivalent in Low Latin (e.g. in the Latin church fathers) of the Greek μυστήριον, and the 'mysteries' were private corporations, just as, conversely, the private corporations bore this resemblance to the 'mysteries' that they centred in some religious element. An entrance fee was exacted from every one becoming a member of a mystery or of any private corporation in general. Ulpian's words may, of course, only be meant in a figurative sense, the idea being merely to compare the fee with the payment made on 'entering the association', or 'secret society'. But they would still be of interest in reference to the question under discussion as showing how readily – even in Ulpian's time – a comparison between a law-school and a corporate society suggested itself. – The arguments on both sides of this question have recently been discussed by A. Pernice in Holtzendorff's *Encyklopädie d. RW.* vol. i. (6th ed. 1902) p. 134, note 3.

and Proculus were the natural centres of all further development. Sabinus himself was the leading spirit among the chiefs of these schools. He pointed out to his pupils the lines on which Roman law should progress, in the sense of ridding itself of old-fashioned formalism. The Proculians, on the other hand, were inclined to abide by traditional rules, though, in so doing, they often, perhaps, sacrificed the spirit to the letter of Labeo's, their master's, teachings. The following dispute may serve to illustrate the difference between the schools. The Sabinians maintained that the defendant in an action was entitled to judgement, even though he only gave satisfaction to the plaintiff *during* the trial: *omnia* judicia esse absolutoria. The Proculians, on the other hand, insisted that in the actiones stricti juris—i. e. in those actions where the issue submitted to the judge was simply whether or no the defendant was liable—he (the defendant) ought, in all cases, to be condemned, if he was liable at the time when the issue was formulated (litis contestatio), and that no payment by him *after* litis contestatio could affect the result. Sabinus's most important work—the one through which he exercised the most lasting influence—was his treatise called 'libri tres juris civilis'. Starting from the law of inheritance and passing on to the several juristic acts, he exhibited the entire body of the civil law, classified according to subjects, and succeeded, like Labeo—whose influence he too felt, though in some points he controverted Labeo's teachings—in bringing out a number of new points of view, so much so, that his work was adopted henceforward as a fundamental treatise for the study of the jus civile.

The first indications of the so-called classical jurisprudence appeared early in the second century. Its task was to reconcile the opposition between the two schools, and its labours resulted in the fusion of the jus civile and the jus honorarium (which latter had already become stationary) with the new imperial law into a harmonious whole. The foundations were laid by P. Juventius Celsus in his 'Digesta' (in thirty-nine books). He was a follower of Proculus, and died probably in the reign of Hadrian. Celsus was succeeded by a more eminent lawyer of the Sabinian school, Salvius Julianus, a native of Hadrumetum in the Roman province of Africa, who flourished in the reigns of Hadrian and Antoninus Pius. The task of his life consisted, in the first place, in the final consolidation of the edictal law (supra, pp. 85, 86); and, secondly, in the

composition of his great Digest in ninety books. Like Celsus, he adopted the arrangement of the praetorian edict, utilizing it, however, for the purpose of expounding *the whole* of Roman law. His vast acquaintance with practical case-law, the ingenuity of his own countless decisions, his genius for bringing out, in each separate case, the general rule of law which, tersely and pithily put, strikes the mind with all the force of a brilliant aphorism and sheds its light over the whole subject around—these are the features which constitute the power of his work. Roman jurisprudence had completed its dialectic training under Labeo and Sabinus, and the time had now arrived for applying to the immense mass of materials the principles, categories, and points of view that had been thus worked out. Julianus's Digest exhibited Roman jurisprudence in all its strength,[13] and its success was proportionately great. Surrounded as he was by numerous friends, all working towards one and the same end, the great jurist's triumph was assured. Of such fellow-workers we may mention two: one, Sextus Caecilius Africanus, a rugged and weighty writer, the other, Sextus Pomponius, a man of extensive reading and learning, who was also interested in historical research. After this, the star of the Proculian school began to set. The jurist Gajus, who died after 180 A.D., and whose institutional treatise was adopted as a model by all subsequent writers of legal textbooks, is the last in whom the opposition between the schools is represented. He himself was a Sabinian. He still mentions contemporary teachers 'of the other school', i.e. Proculians. But their names have not been handed down to us. The Sabinians gained the day. From the time of Salvius Julianus, and as a consequence of his labours, there was but one jurisprudence, and the lines on which it was progressing were those marked out by him.

The real nature of the task to fulfil which was the function of Roman jurisprudence had now become manifest. To unfold the great legal system in all its wealth and multiplicity by means of decisions and opinions, while following up in its details each question that arose, and yet, at the same time, to produce order out

[13] On Julianus and his writings, cp. H. Buhl, *Salvius Julianus*, part i. (1886). As to his official career, see Mommsen, *Salvius Julianus*, in the *ZS. d. Sav. St.*, vol. xxiii. p. 54 ff. On p. 108 ff. of the work just cited Buhl deals with the aphoristic wisdom of Julianus.

of chaos by vindicating the force of firm principles—such was the problem that Roman jurisprudence had to solve. A kind of casuistry of a higher order was required, such as had already been exhibited to the Romans in the great Digest of Celsus, and more especially in that of Julianus. At this point—it was towards the end of the second century—the Greek-speaking Orient sent its intellectual forces to participate in the creation of a jurisprudence for the whole Empire, emphasizing thereby that consciousness of a great internal unity to which the Empire had already attained.[14] Under Marcus Aurelius and Commodus, Q. Cervidius Scaevola, a Greek by birth and subsequently a member of Marcus Aurelius's council of state (consilium), wrote his Digest in forty books, in which he set forth Roman law after the casuistic method, in the shape of 'responsa', adopting, like others, the arrangement of the edict. His pupils were Septimius Severus, who afterwards became emperor, and, above all, Aemilius Papinianus, the most illustrious and, with Julianus, the greatest of Roman jurists. Papinian, who, like Scaevola, was an Oriental, combined the moral weight attaching to a character of sterling rectitude with the elegance of a Greek and the terseness and precision of a Roman. Like Scaevola he adopted the casuistic method of expounding the law by means of answers to concrete legal cases. He carried this method to its highest perfection. His most important works were nineteen 'libri responsorum' and thirty-seven 'quaestionum libri', in the latter of which he followed the arrangement of the edict. A mass of detached questions is here treated with the utmost lucidity; the decisions are formulated with great breadth, but, at the same time, with due regard to their proper limitations; and the manner in which the essential facts of each case are thrown into sharp relief and their accordance with the legal principle propounded is brought out is so striking as to carry conviction, even where no arguments are adduced. Greek and Roman culture, acting and reacting on one another, produced in Papinian the brightest luminary of Roman jurisprudence. What he had taught and demanded throughout his life, viz. that what was immoral should also be deemed impossible,[15] he sealed with his death. He was murdered

[14] Caracalla gave expression to this fact by extending the Roman franchise to provincials; infra, § 33.

[15] Cp. l. 15 D. de cond. inst. (28, 7).

by the servants of Caracalla in 212 A. D. on account of the unswerving resistance which he opposed to the fratricidal designs of that tyrant.

After Papinian the period of decline begins. Roman jurisprudence had accomplished its masterpiece. The era of creative genius is followed by the labours of the compilers. Papinian's pupil, Domitius Ulpianus, a Syrian by descent (he derived his origin from Tyre), summed up the results achieved by his predecessors in a critical spirit, and embodied them in his voluminous commentary on the praetorian edict in eighty-three books, in his fifty one 'libri ad Sabinum', and in a long series of monographs—most of his works dating from the reign of Caracalla (212–217 A. D.). Next to him, and working in a kindred spirit, there is the jurist Julius Paulus, who was probably a pupil of Scaevola's. Like Ulpian, he was an unusually prolific writer. His principal works were also a commentary on the edict (in eighty books), and a commentary ad Sabinum (in sixteen books). From this time onward it was in the main through the medium of Ulpian's and Paulus's writings that the labours of the great jurists operated on subsequent ages. The immense intellectual achievements of Roman jurisprudence were there put together in a clear and easily intelligible form. The foundations of Justinian's Digest were thus laid. A touch of the bright Greek spirit illumined the writings of Ulpian and caused them to be preferred to those of Paulus, where the thought is perhaps occasionally more profound, but the struggle with the matter more apparent. Ulpian's writings form the groundwork of Justinian's Digest. They constitute one-third, Paulus's writings about one-sixth of the Digest (there are 2,462 passages from Ulpian and 2,080 from Paulus), so that about one-half of that part of our Corpus juris which consists of the Digest owes its origin to the writings of Ulpian and Paulus. After Ulpian only one other jurist, Herennius Modestinus, a pupil of Ulpian's and, like him, a native of the Greek portion of the empire, attained to eminence. Little, however, had been left for him to do. His favourite topics are the law relating to the public officials of the incipient monarchy, and certain subtle questions of theory and practice. It was soon after his time that Roman jurisprudence lost its leading position. The jus respondendi ceased to be conferred after the close of the third century. The emperor alone gave responsa, in the form of the 'rescripta principis' (infra, § 19), and

the last achievement of Roman jurisprudence—for its vitality had not yet passed away—was to infuse its spirit into the numerous rescripts of Diocletian and his successors.[16]

From Labeo and Sabinus down to Celsus and Julianus, i. e. during the first century of the Empire, the development of Roman jurisprudence had been steadily progressive. From Celsus and Julianus to Scaevola and Papinian, i. e. during the second century, it stood at the height of its power. From the time of Ulpian and Paulus, i. e. from the third century onwards, a period of uninterrupted decline set in. The treasure of Roman jurisprudence lay henceforth in the wealth which the past had produced. And a wonderful treasure it was which was thus entrusted to the safe-keeping of the jurists, and which they now passed on to the emperors and, through them, to the coming generations.

The task which had devolved upon Roman jurisprudence, and which it had now solved, had been a twofold one: first, to consolidate into a uniform system the law that lay stored up in all the manifold sources, from the time of the Twelve Tables downwards; secondly, to develop, in a scientific form, the abundance of matter which these sources of law contained. The time had arrived for a new 'interpretatio'. Just as, at an ealier date, the Twelve Tables had to be 'interpreted', so now, it was above all things the praetorian edict that required to be subjected to a similar process. It was only in a rough and ready manner, in a few broad outlines, that the praetorian edict had been able to work out the principles of a free, equitable law for the mutual dealings between man and man. There was a large field for further labour here. Nay, what is more, there were a great many subjects—such as the principles of representation, the legal effect of conditions, the contractual liability for negligence, and many others—as to which no information whatever was to be gained either from the praetorian edict or any other written source of law. The problem here was to discover the true nature of the dealings themselves, to trace the *unexpressed* and *unconscious* intention underlying all such dealings, and, having traced it, to put it into words, to clothe it in a form in which definiteness

[16] Cp. F. Hofmann, *Kritische Studien zum römischen Rechte* (1885), pp. 3-35: *Der Verfall der röm. RW.*; Krüger, *G. der Quellen*, &c., p. 274. Nevertheless it would seem that instances of grants of the jus respondendi occurred even under Diocletian (Krüger, p. 260, n. 6).

and lucidity should be coupled with a degree of comprehensiveness sufficient to bring out the broad general principle governing, not merely a large number of cases, but positively *all* cases, including those which were peculiar and exceptional. Such a problem touched the creation rather than the application of law. But it was precisely in performing a task of this kind that the genius of Roman jurisprudence came most strikingly into play. In spite of its innate dialectic strength and discipline, it had but few dogmatic interests in the modern scientific sense of the term. It gave little thought to the abstract conception of law, of ownership, or of liability; and what little it gave, generally yielded but scanty results. But with regard to the consequences involved in the abstract conception of ownership or of liability, its natural instinct was never at fault for a moment. And nowhere was this unique power more conspicuously displayed than in the way the Roman jurists, so to speak, hit upon the precise requirements of bona fides in human dealings and applied them to individual cases. In such transactions, for instance, as sales, or hirings, or agencies, they seemed to know at once, and instinctively, what it was that the nature of the circumstances themselves required, in all cases and in each separate case, quite apart from any explicit declaration of intention on the part of the persons concerned. This wonderful power of discrimination; this clear-sightedness in the adjustment of conflicting principles, guided by a never-failing instinct for discerning the common elements; this unique faculty for giving outward expression to the law inherent in the concrete circumstances, which law, when found supplies the rule—with many practical variations of course—for all other circumstances of the same kind:—these are the features that give to the writings of the Roman jurists their incomparable charm, and to the work they have achieved its indestructible force. It was no mere 'arithmetic of abstractions', as it has been called, that made the Roman jurists as great as they were, it was rather that practical tact which, without always being intellectually conscious of the abstract conception, nevertheless invariably acted in accordance with it, and thus succeeded in bringing out, in the individual case, the general law inherent in all cases of a similar description.

The peculiar genius of the Roman jurists found its fullest scope in the law of obligations, the law of debtor and creditor—the law, that is, which is most properly concerned with the mutual dealings

between man and man—and, more particularly in the law relating to those contracts in which not merely the expressed, but also the unexpressed intention of the parties has to be taken into account, the so-called bonae fidei negotia. And as regards this unexpressed intention which is not, for the greater part, present to the mind of the party himself at the moment of concluding the contract, it was the Roman jurists who discovered it, and discovered it for all time to come, and enunciated the laws that result from its existence. This is a task which will never have to be done over again. And, at the same time, they clothed these laws in a form that will remain a model for all future ages. That is the reason why the law of obligations, and it alone—and more particularly the law of those bonae fidei negotia, and it alone—constitutes what is, in the truest and strictest sense, the imperishable portion of Roman law. The remaining parts of Roman private law never again attained to full and absolute dominion, and they have all been formally abrogated by the German Civil Code. But the Roman law of obligations, though formally superseded, will remain in substance. It cannot be abolished. The intention of the purchaser, the hirer, &c. is the same in all ages, and it is this intention alone that Roman law has made clear. The legislation of Germany may indeed repeal the Roman law on this subject, in point of fact, however, it cannot fail to be in the main a substantial re-enactment of it.

It was precisely the manner in which the Roman jurists exercised their vocation that enabled them to accomplish these striking results and to secure to Roman law its imperishable and irresistible power. For the centre and pivot of all their learning lay at all times in the art of giving responsa, i. e. in the treatment of concrete cases. Roman jurisprudence grew up in immediate contact with practical life, immersed, so to speak, in a multitude of concrete cases, but never at a loss to discover the law inherent in each—a law which, though abstract, met the requirements of details and which, with all its elasticity, was strong and firm enough to govern the vast field of human dealings with triumphant certitude.

The praetorian law was the channel through which the jus gentium had, in the first instance, gained admittance to, and had then rapidly permeated, Roman Law. But it was only in the hands of the Roman jurists that the jus gentium—that law of human dealings which, in itself, was so intangible, so shifting and

so free—received the tangibleness, the perspicuity and, at the same time, the necessary limitations without which the principles of bona fides, in the form in which the Roman jurists had embodied them, could never have retained their indestructible vitality.

The real task that had devolved on Roman law in the course of its development was thus accomplished. The jural reason inherent in the various relations of human intercourse had found an expression of classic beauty in the writings of the Roman jurists. The last touch was all that was wanting. To apply it was reserved for the imperial power.

L. 2 § 47 D. de O. J. (1, 2) (POMPONIUS): Maximae auctoritatis fuerunt Atejus Capito, qui Ofilium secutus est, et Antistius Labeo, qui omnes hos audivit, institutus est autem a Trebatio. Ex his Atejus consul fuit: Labeo noluit, cum offerretur ei ab Augusto consulatus quo suffectus fieret, honorem suscipere, sed plurimum studiis operam dedit, et totum annum ita diviserat ut Romae sex mensibus cum studiosis esset, sex mensibus secederet et conscribendis libris operam daret; itaque reliquit quadringenta volumina ex quibus plurima inter manus versantur. Hi duo primum veluti diversas sectas fecerunt: nam Atejus Capito in his quae ei tradita fuerant perseverabat; Labeo ingenii qualitate et fiducia doctrinae, qui et ceteris operis scientiae operam dederat, plurima innovare instituit.

The first book in which a reconstruction, on scientific lines, of the writings of the Roman jurists (more especially from the materials preserved in Justinian's Digest) has been undertaken is Otto Lenel's *Palingenesia juris civilis* (2 vols., 1889), in many respects a work of fundamental importance. For the jurists prior to Hadrian, reference should be made to the work of Bremer mentioned on pp. 18 and 88, n. 1.

§ 19. *The Republican Empire and the Imperial Administration of Justice.*

The imperial power passed through two stages of development. In its first stage, that of the principatus,[1] the power of the emperor is simply the power of the 'first citizen' of the Republic;

[1] The princeps, as such, was a private individual, distinguished, however, from other private individuals by the fact that he possessed, first, the tribunicia potestas for life—which secured him a decisive influence in the city of Rome—and secondly, the imperium for life, which made him military commander-in-chief in the Empire. Cp. A. Nissen, *Beiträge zum röm. Staatsrecht* (1885), p. 209 ff. Mommsen (*Röm. Staatsrecht*, vol. ii. 3rd ed., p. 745 ff.) takes a somewhat different view and holds that the power of the princeps was, on principle, magisterial.

in its second stage, i. e. from the time of Diocletian and Constantine, it is the power of a monarch. This development is reflected in the history of law. The princeps of the first epoch has no legislative powers; the imperial monarch of the fourth and subsequent centuries has legislative powers. During the period of the principate the emperor's influence on the development of the law is merely incidental and supplementary; during the period of the monarchy he assumes, by means of his legislative authority, the exclusive leadership in all further legal progress.

During the first stage, which extends down to about 300 A. D., the princeps influences the development of law in four ways: by his decisions of particular cases (decreta, interlocutiones), his 'opinions' on particular cases (rescripta), his instructions to officials (mandata), and his public ordinances (edicta).

'Decreta' and 'Rescripta' are essentially of the same nature. They are both means of authentic interpretation. The emperor interprets the law by applying it to a particular case. A rescript (cp. infra, § 57, n. 2) was granted in reply to an inquiry addressed to the emperor either by a magistrate or—as was far more frequently the case—by a private party. It took the form either of an independent reply (epistola) or of a note appended, by way of answer, to the written inquiry (subscriptio). If the emperor's decision of a particular case was made publicly known—'propounded' is the technical term—it thereby acquired a general, quasi-statutory validity (legis vicem); in other words, it was regarded as possessing the force of an authentic, or statutory, interpretation. The validity of decreta and rescripta of that kind was not limited to the life of the emperor who published them, just as the validity of the responsa prudentium was not limited to the particular cases they decided (supra, § 18). The authentic interpretation shares the legal force of the law it interprets.[2]

[2] e. g. the decretum divi Marci on self-help, l. 7 D. ad leg. Juliam de vi privata (48, 7), the epistola divi Hadriani on the beneficium divisionis for several co-sureties, § 4 I. de fidejuss. (3, 20), l. 26 D. eod. (46, 1).—Cp. Mommsen, *Röm. Staatsrecht*, vol. ii. 3rd ed., p. 911 ff.; Wlassak, *Kritische Studien zur Theorie der Rechtsquellen* (1884), p. 132 ff.; Karlowa, *Röm. RG.*, vol. i. p. 646 ff.; Krüger, *G. d. Quellen*, p. 93 ff.—It was not till Hadrian, whose reign marks in many respects a perceptible advance from the principate of the old style to the later monarchy (cp. Bremer, in the *Göttinger Gelehrte Anzeigen*, 1889, p. 429 ff.), that it became customary for the emperor to 'propound' his rescripts, and thus to invest them with quasi-statutory force. From Severus onwards the publication of rescripts was resorted to on a larger scale. Dio-

The 'Mandata' which the emperor addressed to his officials became, as a matter of fact, a source of law in so far as certain portions of them (capita ex mandatis) were regularly repeated in every set of official instructions.[3] The imperial 'Edicts', lastly, were the outcome of that right to issue public orders which vested in the emperor in his magisterial capacity. By means of his edicts on questions of private law he made known the principles by which he intended to be guided in the exercise of his imperial power in reference to any such questions coming before him.[4] Edicts and mandates were only valid, on principle, during the life of the emperor who issued them; if their validity was to extend any further, the next emperor had to repeat them.[5]

The jurists gave these various manifestations of the imperial power, so far as they bore on the development of law, the collective name of 'constitutiones', and assigned to constitutiones a quasi-statutory force in so far as the conditions of permanent validity had been satisfied—which (as we have seen) was not a matter of course in the case of edicts and mandates. During this epoch, however, a statute proper assumed, as a rule, the form, not of an imperial ordinance, nor again of a popular statute—examples of the latter occurred but exceptionally, and only in the early part of this period—but of a senatusconsultum. During the Republic, the authority of the senate was still confined to regulating the *execution* of the laws by means of an authoritative interpretation. From the beginning of the Empire, however, though at first in the face of some opposition (Gaj. 1, 4), the senate exercised an independent legislative power operating, of its own force, as a source of jus civile. The decree of the senate was now regarded as taking the

cletian published an enormous number. The practice was, however, abandoned by Constantine and his successors in favour of the method of direct imperial legislation (infra, § 20). It was only the 'propounded' rescripts that became operative as sources of law, and passed into the writings of the jurists. Mommsen, *ZS. d. Sav. St.*, vol. xii. p. 251 ff.; vol. xxii. p. 142.

[3] e. g. the caput ex mandatis in favour of soldiers' wills, which became a standing order from the time of Hadrian, l. 1 pr. D. de testam. militis (29, 1).

[4] e. g. l. 4 D. ne de statu defunct. (40, 15): Divus Nerva edicto vetuit post quinquennium mortis cujusque de statu quaeri.

[5] Mommsen, *Röm. Staatsrecht*, vol. ii. (3rd ed.) pp. 905, 913–915; Wlassak, *Kritische Studien*, p. 166 ff. Hence it was very rarely that the emperors resorted to edicts for the purpose of introducing rules of law which were intended to be permanent.

place of the popular statute. The princeps has the right to treat with the senate and to originate a decree of the senate by means of a motion (oratio); since Hadrian, in fact, the power to submit bills to the senate for the purpose of having them enacted as senatusconsulta is exclusively exercised by the emperor. To what extent the right of the senate to assent to a motion of the emperor's had, in the course of this epoch, sunk to a mere matter of form, is apparent from the fact that it could become the practice, at a subsequent date, to quote, not the senatusconsultum, but merely the oratio, that is, the motion of the emperor.[6]

GAJ. Inst. I § 4: Senatusconsultum est quod senatus jubet atque constituit, idque legis vicem optinet, quamvis fuerit quaesitum. § 5: Constitutio principis est quod imperator decreto vel edicto vel epistula constituit, nec umquam dubitatum est quin id legis vicem optineat, cum ipse imperator per legem imperium accipiat.

L. 1 § 1 D. de const. princ. (1, 4) (ULPIAN): Quodcumque igitur imperator per epistulam et subscriptionem statuit vel cognoscens decrevit vel de plano interlocutus est vel edicto praecepit, legem esse constat. Haec sunt quas vulgo constitutiones appellamus.

During what has been termed the 'republican' Empire, it was principally by means of decrees and rescripts that the emperors influenced the development of Roman law. These decrees and rescripts represent the form in which the emperor declared the law in reference to particular cases coming before him. The praetor's free power to make new law had come to an end with the final consolidation of the Edict by Hadrian (§ 17). His place in this respect was taken by the emperor. At the period of which we are speaking the emperor was not yet legally invested with legislative authority. In order therefore to carry on the development of the law, he availed himself, in the main, like the praetor before him, of his 'jurisdictio', that is, his judicial power, his unrestricted right to declare the law after the fashion of a magistrate.

There was, however, an important difference in the methods respectively adopted by the emperor and the praetor in administering justice. And this difference showed itself in the novel character of the results achieved by the emperors.

[6] e.g. the oratio divi Severi on the property of wards, l. 1 D. de reb. eor. (27, 9). Karlowa, *loc. cit.* p. 643 ff.; Krüger, *loc. cit.* p. 83 ff. Senatusconsulta, like popular statutes, applied only to Roman citizens; Wlassak, *Röm. Processgesetze*, vol. ii. p. 173 ff.

In all legal matters coming under his cognizance the emperor proceeded *extra ordinem*; that is, instead of following the ordinary judicial procedure—involving a reference of the decision to a sworn judge and the consequent use of a formula—he employed the administrative procedure (infra, § 57). He either decided the case himself by his sovereign magisterial decree (decretum), or else he appointed a delegate to dispose of it in his stead, and often in accordance with precise instructions set out in an imperial rescript. In the procedure extra ordinem—also called the procedure 'per cognitionem'—the magistrate always exercised a free discretion. And it was precisely this element in the jurisdiction of the emperor that enabled him to develop the law by means of his decrees and rescripts. These decrees and rescripts were intended, by their very nature, to serve as modes of declaring and applying and even interpreting the existing law (supra, p. 105). But the imperial interpretation was unfettered; it was freer, if possible, even than the interpretation of the ancient jurists, which was bound at any rate by the letter of the law (supra, p. 55). It was an interpretation that really involved an indefinite power of creating new law.

It was thus that the emperors, in the exercise of their jurisdiction, intervened to protect a slave against ill-treatment on the part of his master (infra, § 32), and to protect a married daughter from an arbitrary dissolution of her marriage by her paterfamilias (§ 93, n. 2). In the same way the emperors carried on the development of the law of set-off (§ 89 II. 2) and the law of wills (§ 112).

Nay, what is more, the emperors were able, by means of their jurisdictio, to call into being a number of institutions entirely unknown to the previous law. The most important of these was the 'fideicommissum'. Down to Augustus the only kind of bequest recognized by Roman law was one made in accordance with the strict, formal requirements of a legatum (§ 115, I). The Emperor Augustus was the first to introduce into the administration of justice the principle that, where a testator requested a person who was benefited under his will to make over the benefit he received to a third party—this is the meaning of fideicommissum—the request should be legally enforceable, even though it had been made without any form whatever. Augustus entrusted the consuls with the exercise of the new jurisdiction; after Titus, a special praetor fideicommissarius was appointed to adjudicate on such

matters extra ordinem as the emperor's delegate, and in the provinces the like function was imposed on the governors.[7] In this way the fideicommissum, or informal bequest, came into use as a legal institution, and such was its subsequent development that it gradually revolutionized the whole Roman law of bequests, and even—when 'universal' fideicommissa were introduced—the whole Roman law of succession of the older type (§ 117). Besides the legal recognition of fideicommissa, we may mention, as another example of what was effected by the extraordinary jurisdiction of the emperors, the fact that honoraria were now for the first time made legally recoverable. According to the Roman civil law payment for services could only be enforced by action, if the services were of the meaner kind, 'operae illiberales.' It was only under the imperial procedure extra ordinem that legal protection was extended to honoraria for 'liberal' services. The Roman civil law treated earnings derived from labour somewhat slightingly. The legal recognition of contracts of service, in the modern sense, was due to the jurisdictio of the emperors. In modern systems[8] a payment due under a contract of service is, as a rule, equally recoverable, whether the services rendered be 'liberal' or otherwise, and the distinction between slave labour and labour worthy of a free man is unknown, all honest labour being deemed worthy of a free man.

L. 1 pr. § 1 D. de variis et extraord. cognit. (50, 13) (ULPIAN.). Praeses provinciae de mercedibus jus dicere solet, sed praeceptoribus tantum studiorum liberalium.—Medicorum quoque eadem causa est quae professorum—et ideo his quoque extra ordinem jus dici debet. — —

Cp. l. 7 D. mandati (17, 1). L. 1 C. mandati (4, 35).

The new body of law which thus grew up under the hands of the emperors may be called imperial jus extraordinarium. It was new law, for though nominally interpreting the existing law, the emperors were in fact transforming it. The new law could not be made to fit precisely into either of the established legal categories of jus civile and jus honorarium. On the one hand, the source from which it sprang was not one recognized by the civil law as a source of law, and, on the other hand, as opposed to the jus honorarium,

[7] Cp. Wlassak, *Kritische Studien*, p. 164 ff.; infra, § 115 II.
[8] See § 611 ff. of the German Civil Code.

it was not confined, either in point of time to a particular term of office fixed in advance, or in point of space to a particular sphere of jurisdiction. The jus extraordinarium was in fact a new thing, a third species of law which really broke through the bounds of the older legal classification. It was, however, most closely akin to the old jus honorarium. Like the praetorian law which it displaced the imperial law was the outcome of that free power to declare the law which belonged to a Roman magistrate; it was a new type of jus honorarium, a type adapted to the monarchical tendencies of the age.[9]

But the importance of the Imperial law was due, not so much to the several legal institutions that sprang from the jus extraordinarium, as rather, first and foremost, to the fact that it transformed the fundamental ideas on which the whole legal system rested.

During the Empire there was a steady and continuous expansion of the area of Roman law. From the time of Caesar the practice of granting the Roman civitas, or the jus Latii, to individuals, and even to entire communities, became very general. Vespasian bestowed the jus Latii (that is, all the rights comprised in the *private* law of Rome; infra, § 33) on the whole of Spain. The final step was taken by Caracalla when, in the year 212 A. D., he conferred the Roman civitas on every community within the Empire; in other words, on all the free members of any political community. Roman law, which had continued to be, in theory, merely the local law of one particular city-community, was thus converted into the law of an Empire, and the community of Roman citizens became a community co-extensive with the civilized world. By thus extending the Roman civitas Caracalla had laid the axe unto the root of every other law in the Empire, including, amongst others, Greek law, which still continued to flourish in full vigour in the Hellenistic East.[10] Just as there was now but one emperor and one Empire, so henceforth there was to be but one law. In the

[9] Cp. Wlassak, *Kritische Studien*, pp. 51 ff., 153 ff., and the same author's observations on this topic in *Röm. Processgesetze*, vol. i. (1888) pp. 219, 220, note.

[10] The introduction of Roman law into the provinces was not accomplished without considerable difficulties. Thus a Roman will had, of course, to be drawn up in Latin. But as early as 230 A. D. we find Alexander Severus permitting the Greek-speaking portion of the Empire to make their wills in Greek (Mitteis, *Aus den griechischen Papyrusurkunden* (1900), pp. 21, 43). The suppression of Greek law was, as might have been expected, but partially successful. Cp. infra, p. 115.

hands of the emperors Roman law became the instrument by which a uniform law was created for the whole vast Empire, and by which, at the same time, the absolute power of the emperors was firmly established on a foundation of unshakable strength.

For the imperial system of law which was now in course of development the traditional antithesis between civil and praetorian law ceased to have any meaning. The province of the imperial jurisdiction was steadily enlarged during the Empire. It came to embrace, not only the jurisdiction exercised by the emperor himself, but also the jurisdiction of his delegates, e. g. the praetor fideicommissarius (p. 108). The imperial delegates, like the emperor himself, acted extra ordinem, that is, they decided cases in person without a sworn judge or a formula. Now, the officials of the Empire were tending more and more to become delegates of the emperor, and were thus tending at the same time to pass from republican magistrates into officials of the imperial monarchy. By the time of Diocletian the Roman state was definitely established on a bureaucratic basis with a hierarchy of officials. The entire administration of the law was henceforth conducted extra ordinem in the name of the emperor (cp. § 57).

The effect of the jurisdictio extra ordinem was to obliterate the old antithesis of jus civile and jus honorarium. All law was alike administered in accordance with the will of the emperor, irrespective of the source from which it was derived. Hitherto the practical importance of the opposition between jus civile and jus honorarium had consisted more particularly in the fact that the judex (i. e. the sworn judge who was to adjudicate on the case) was bound to take account of the jus honorarium, not by virtue of his office—for the jus honorarium was not *law* in the true legal sense—but only by virtue of the express instructions of the magistrate as set forth in the formula. If the formula did not contain an exceptio, i. e. a plea of defence recognized by the praetorian law, the judex was precluded from taking account of the facts on which such a plea might have rested (infra, § 53, II). All this was changed now. In the procedure per cognitionem there was no formula of the old kind. The emperor and his officials administered the praetorian law in precisely the same way as the jus civile, giving precedence to the jus honorarium. The jus honorarium came to be identified broadly with the new law which overrode the

old jus civile. The dual system of the earlier law had already been worked by the labours of the Roman jurists into a new and uniform body of law. Within the sphere of the imperial procedure per cognitionem the old formal antithesis had completely disappeared. It is true, the idea of a distinction between a law operating jure—the jus civile—and a law operating merely 'tuitione praetoris'—the jus honorarium—was still maintained and is even to be found in the Corpus juris. But as far as the imperial jurisdiction was concerned, the distinction had in the main but a purely theoretical value. It was by the aid of the formula that the jus honorarium had first grown strong (supra, pp. 78, 79); when the formula disappeared, the special character of the jus honorarium, and indeed the special character of the whole dual system of Roman law, disappeared with it.

The time was now at hand for removing the antithesis between jus civile and jus honorarium—that last relic of the republican constitution—as well as the antithesis between Roman and Greek law. In the imperial law of a world-wide empire there was no room for antitheses such as these.

§ 20. *The Monarchical Empire and the Imperial Legislation.*

The second stage of the Empire commences with the reign of Diocletian about 300 A. D.

Hadrian had put a final stop to the growth of the praetorian edict, and after the close of the third century Roman scientific jurisprudence ceased to be an independent force in the development of Roman law. From the same time onward the imperial power, which had now definitely assumed a monarchical form, commenced to assert an exclusive control over the further evolution of the law. It was through the medium of the imperial statute that this control was henceforth exercised.

The imperial statute originated in the motion which the emperor introduced to the senate (oratio, supra, p. 107), but the form of communicating it to the senate has now been discarded. Imperial legislation supersedes senatorial legislation. An imperial statute is, so to speak, an oratio directly promulgated to the nation at large. Hence it is described as an 'edictum' or 'lex generalis'.

In the earlier Empire legislation was in effect carried on by

means of rescripts and decrees. Whenever the emperor's decision of a particular case was publicly announced, that decision acquired the force of general law (supra, p. 105). The number of rescripts thus publicly announced had steadily multiplied. We still possess a thousand such rescripts published by Diocletian. Diocletian, however, was the last emperor who chose to exercise his legislative powers in this the older form. After Constantine rescripts cease to figure among the sources of law. They continued, indeed, to be issued, but the emperor's decision was only communicated to the parties immediately concerned. The idea was, that what professed to be nothing more than the decision of a particular case, should only have binding force for that particular case. A clear distinction was drawn between the legislative and the judicial functions of the emperor; in other words, between his power to create law, and his power to interpret, or declare, the law. The practice of legislating for the nonce, by means of imperial letters (rescripta) duly published, was discontinued. The principle established itself that only what had been weighed in its bearings on the national interests as a whole should have the force of law binding on the whole nation. The course of legislation was to be determined, not by the accidental requirements of single cases, but by the general requirements of the Empire. The limitations inherent in the nature of any imperial decision of a particular case—a rescript or decree—asserted themselves, and the imperial statute, casting off the form of a judicial decision, definitively assumed an independent form of its own.[1] The modern type of monarchical legislation thus began to attain to a consciousness of its own nature and conditions.

L. 1 C. de leg. (1, 14) (CONSTANTIN.): Inter aequitatem jusque interpositam interpretationem nobis solis et oportet et licet inspicere.

L. 12 § 3 eod. (JUSTINIAN.): In praesenti leges condere soli imperatori concessum est, et leges interpretari solum dignum imperio esse oportet.

L. 11 C. Th. de rescr. (2, 2) (ARCADIUS et HONORIUS): Rescripta ad consultationem emissa vel emittenda in futurum iis tantum negotiis opitulentur quibus effusa dicebantur.

Imperial legislation, which henceforth took the lead in all further

[1] On the above subject see Mommsen, *ZS. d. Sav. St.*, vol. xii. pp. 258 ff., 263, 264.

progress, had a twofold task to fulfil: first, to complete the development of Roman law; secondly, to gather in the results.

The completion of the development of Roman law involved, on the one hand, a final process of filing down the jus civile by the jus gentium, and, on the other, the final removal of the antithesis between jus civile and jus honorarium. Both these tasks were solved, not by the short and sharp process of codification, but by a series of separate statutes. For the caution, the conservatism, the dislike of hasty innovation that characterize the history of Roman law in general, are equally characteristic of the methods of imperial legislation. From Diocletian and Constantine to Justinian, i. e. during an interval of over two centuries, the ancient traditional law, the 'jus vetus', was subjected to a continuous process of polishing and filing at the hands of successive emperors, till perfect unity and harmony had been established. And the majority of final reforms which effected alterations of a more far-reaching character in the private law, were only accomplished by Justinian, the last Roman emperor whose own proficiency in the law enabled him, in some measure, to dispense with the aid of his legal advisers and to work independently at the improvement of Roman law. Some of his reforms—e. g. in the law of inheritance—were not accomplished till after the completion of the Corpus juris, by means, namely, of his Novels. Down to the Corpus juris the Twelve Tables continued in theory to constitute the basis of the entire body of Roman law. Down to the Corpus juris, again, the antithesis between jus civile and jus honorarium continued in theory to be maintained. Justinian's Corpus juris summed up the results of that uninterrupted development which had commenced centuries ago with the Twelve Tables, and the Twelve Tables themselves, with all that followed them, were now superseded by the great imperial code of Justinian. Theoretically speaking, this code signalized the final victory of the jus civile, because the law begotten by imperial legislation was civil law; in point of fact, however, it was the jus gentium, allied with the jus honorarium, that had triumphed all along the line.

Caracalla had conferred the Roman franchise on all citizens of the Empire (supra, p. 110). The idea still prevailed that Roman law only applied to citizens of the Roman city-state. In order to extend Roman law to the Empire the citizens of the Empire had to

be converted into citizens of Rome. But the new Roman citizens were citizens of the orbis terrarum. There was thus but one nationality in the Roman Empire, to wit the Roman, and the Roman nation was co-extensive with that portion of mankind upon which the civilization of Western antiquity rested. In point of form Greek nationalism was thus merged in the Roman nation, and Roman law displaced the Hellenic law of the Greek-speaking East. In point of fact, however, this Romanizing of the Hellenes proved to be the very process by which the Hellenization of the Roman Empire and of Roman law was most effectually promoted. Within the immense area covered by Greek civilization Greek law had developed freely and fully, and had, at the same time, attained to a degree of unity which made it strong against attack. Our knowledge of this law has quite recently received a notable accession through the discovery of the papyri, the value of which for purposes of legal history is becoming daily more apparent. The picture of Greek law during the empire which these ancient records, so tardily rescued from the sands of Egypt, present to our view is one of striking vividness, and it is the picture of a law remarkable alike for its creative energy and the wealth of its contents.[2] It was obvious that so highly developed a legal system could not be set aside by Caracalla by a mere stroke of the pen. Whatever the formal validity of the Roman imperial law might be, the mass of the people continued in actual practice to adhere to the habits of Greek national law.[3] And not only did the movement towards

[2] Of the works that have contributed to our appreciation of the importance of the papyri for purposes of the history of Roman law during the Empire, the most valuable is that of Mitteis, *Reichsrecht und Volksrecht in den östlichen Provinzen des römischen Kaiserreichs* (1891). Compare also, more particularly, Mitteis's most suggestive lecture: *Aus den griechischen Papyrusurkunden* (1900); Gradenwitz, *Einführung in die Papyruskunde* (1900), and the new *Archiv für Papyrusforschung* (edited by Wilcken), which first appeared in 1900.—Among points of special interest may be mentioned, on the one hand, the extent to which the Greeks in their legal dealings availed themselves of deeds admitting of direct execution, and, on the other hand, the existence—in Egypt at any rate, and possibly elsewhere—of a system of public registers employed partly in connexion with the levying of taxes, and partly for the purpose of regulating the transfer and other dispositions of land. Mitteis, *Archiv f. Papyrusforschung*, vol. i. (1900) p. 183 ff.; Spiegelberg, *Die demotischen Papyrus der Strassburger Bibliothek* (1902), p. 10.

[3] That this was the case has been demonstrated by Mitteis in his *Reichsrecht u. Volksrecht* (v. note 2). A good illustration of the mixed Graeco-Roman law that was practised among the people is afforded by the Syrio-Roman Book of Law referred to below (p. 121, n. 5).

Pan-romanism, which sought to bring the entire Hellenic East under the sway of Roman law, fail in its object, but it actually opened the doors to Greek legal ideas, and gave them free scope to react, in their turn, on the further development of Roman law. From the fourth century onwards the tendency to shift the centre of gravity to the Eastern, that is, the Greek portion of the empire, became more and more pronounced. The provinces now became the seat of the Empire's strength. Formal expression was thus given to what had already been an accomplished fact: the victory of cosmopolitan Hellenism over the spirit of ancient Rome. It was no longer the traditions of Rome and Italy, but the views and requirements of Greek provincialism that surrounded and influenced the emperor of Constantinople. The provinces had ousted the old premier country, Greece had triumphed over Rome. And so it came to pass that the jus gentium finally displaced the old jus civile. Centuries ago the intercourse with the Greeks had engrafted the jus gentium on the local law of Rome. Now that the native soil of the jus gentium itself had become the scene of legal development, the jus gentium could not fail to put forth all its strength. The jus gentium, and with it the jus aequum, thus attained to full maturity, and received that final form in which it dominated with essential uniformity the whole field of private law. Under the influence of Greek law the development of Roman law was completed, and the local law of a city became a law available for the world in general.

One thing only remained to be done, and that was to gather in the ripe fruits and store them for future generations. This task also devolved on the emperors, and was successfully performed by them.

§ 21. *Codification.*

I. The Stages preliminary to Codification.

In the later Empire (which dates from the fourth century) there were two groups of sources of law: first, the 'jus vetus', or 'jus' simply, i.e. the old traditional law, the development of which was completed in the classical period of Roman jurisprudence (in the course of the second and the beginning of the third century); secondly, the 'leges' or 'jus novum', i.e. the later law which had sprung from imperial legislation. These two classes of law, 'jus'

and 'leges', mutually supplementing each other, constituted the whole body of law as it existed at the time, and, taken together, represented the result of the entire development of Roman law from the earliest times down to the period we have now reached, viz. the epoch of the later Empire.

The 'jus' was based, indeed, on the Twelve Tables, the plebiscita, the senatusconsulta, the praetorian edict, and the ordinances of the earlier emperors. In reality, however, neither the tribunals nor the parties were in the habit of using these sources of law in their original form. They preferred to resort to the classical juristic literature, where they found the contents of these sources set forth and worked out. It was not the praetor or the plebiscitum that was now quoted, but Papinian, Ulpian, Paulus, and the other jurists. And, at the same time, no distinction was made as to whether the particular opinion had happened to be conveyed by Paulus or Papinian in the shape of a 'responsum' or not. The authority which the responsa, and the literature connected therewith (p. 93), had acquired since the opening of the second century was now actually transferred to juristic literature in general. To this must be added the fact that the practice of conferring the jus respondendi on individual jurists was discontinued in the course of the third century; after Diocletian the emperor was the only person entitled to give authoritative responsa, which he did by means of his rescripts (p. 101). Thus it happened that later ages failed to appreciate the distinction between jurists who had, and jurists who had not, the jus respondendi. The writings of jurists who had not possessed the jus respondendi were cited as entitled to an authority in no way inferior to that of the writings of privileged jurists, provided only they were supported by the same *literary* prestige that distinguished the writings of the illustrious privileged jurists. Thus, for example, in the fourth century, Gajus—who flourished as a professor of law under Antoninus Pius and Marcus Aurelius, and whose writings delighted all subsequent ages by a fluency and lucidity worthy of a Greek—enjoyed, in the courts of law, an authority equal to that, say, of Paulus or Papinian, in spite of the fact that he had never possessed the jus respondendi. Considering that, in the case of the privileged jurists, their other writings—which, of course, had nothing to do with their jus respondendi—were ranked on a par with the writings on the

responsa, it was altogether absurd to insist on the jus respondendi as a condition of judicial authority. The practice of not discriminating between the different kinds of writings necessarily led to the practice of not discriminating between the authors themselves—which is only another way of saying that the transfer of the authority of the responsa to juristic literature in general had become an accomplished fact.

A keenly felt want was satisfied by this development. The old sources of law, and more especially the popular statutes and the praetorian edict, had ceased, by this time, to be generally intelligible, partly on account of their language, partly on account of the bald, sententious, pregnant phraseology in which they were couched. Since people were no longer able to make use of the old sources of law themselves, they were driven to resort instead, on a more extensive scale, to the juristic literature that had sprung from those sources. In other words, 'jus,' or the law of the earlier stages of development, ceased to be practically available in any other form but that in which it appeared in the writings of the jurists: the jus (vetus) became identified with jurist-made law.

All the emperors had to do here was, partly to modify, partly to supplement and confirm the law as they found it. For this purpose a number of 'laws of citations' were enacted, among which Valentinian the Third's Law of Citations (426 A.D.) was the most important. Valentinian merely sanctioned what had already become an established usage. He ordered that the writings of the jurists Papinian, Paulus, Ulpian, Gajus, and Modestinus, as well as the writings of all those who were cited by these jurists (the limits of classic literature being thus officially determined), should possess quasi-statutory force, so that their opinions should be binding on the judge.[1] If the opinions differed on the same question, that

[1] The Law of Citations is based on the assumption that the writings of the above-named five great jurists, Papinian, &c., are widely circulated and generally known. This assumption is not true of the writings of the other jurists (Scaevola, Sabinus, &c.), who are mostly older. Hence it is provided that the writings of these other jurists shall only be used, if they—in the words of the enactment—'codicum collatione firmentur'. The meaning of these last words is doubtful. The usual translation, according to which they would mean that the contents of those writings were to be confirmed 'by a comparison of manuscripts', seems as little accurate as it would be to translate 'codex Theodosianus' by the 'Theodosian manuscript'. 'Codex' does not mean a manuscript, as such, in our modern sense of the term, but a parchment volume, a 'corpus' (cp. Mommsen, *ZS. d. Sav. St.*, vol. x. p. 346),

opinion should prevail which was supported by most jurists; if the numbers were equal, Papinian's opinion should prevail, or, if Papinian had expressed no opinion on the question, the judge was to exercise his discretion. Not a word is said about citing the old sources of law themselves; their force as law has passed on to the juristic literature. Valentinian the Third's Law of Citations marks the completion, for the time being, of the development which had commenced with the responsa of the old pontifices and the jus respondendi of Augustus. Never did a literary movement achieve a more unqualified success.

L. 3 C. Th. de resp. prud. (1, 4) (THEODOS. et VALENTINIAN.): Papiniani, Paulli, Gaji, Ulpiani atque Modestini scripta universa firmamus ita ut Gajum quae Paullum, Ulpianum et cunctos comitetur auctoritas, lectionesque ex omni ejus opere recitentur. Eorum quoque scientiam quorum tractatus atque sententias praedicti omnes suis operibus miscuerunt ratam esse censemus, ut Scaevolae,

a *book*, more especially a book containing a variety of things, e. g. the 'codices accepti et expensi' (infra, § 81), or the 'codices' (i. e. the books) of the mathematici in l. 10 C. de episc. aud. (1, 4). In the same way we hear of a 'codex Gregorianus atque Hermogenianus', i. e. a collection by Gregorianus and Hermogenianus (cp. the gesta de recip. cod. Theod.: ad similitudinem Gregoriani atque Hermogeniani *codicis* cunctas *collegi* constitutiones decernimus); and again of the 'codex Theodosianus' and the two codices of Justinian: the 'codex juris enucleati', i. e. the collection of jurist-made law in the Digest, and the 'codex constitutionum' (cp. const. Deo auctore, § 11). The words in question would accordingly mean that the writings of the jurists other than the specified five must be confirmed by a collation of the 'collections', i. e. only such passages may be used as have been admitted to the 'collections'. The only possible interpretation would seem to be that it was intended to make collections (codices) of the passages taken from the writings of other jurists, which were to be used in addition to the works of Papinian, &c.—a plan which might be compared with that indicated in c. 5 C. Th. de const. princ. (1, 1) and actually carried out in Justinian's Digest, except that, in the latter, the validity of *all* juristic writings was confined to such excerpts as had been admitted (cp. infra, note 2). Thus the words would mean that quasi-statutory force should attach to all the writings of Papinian, Ulpian, Paulus, Gajus, and Modestinus, but only to certain excerpts from the writings of the remaining jurists cited by Papinian, &c. But since no such collections of excerpts from the works of the remaining jurists were ever made, the practical result was that which found expression in the interpretation of Valentinian's Law of Citations contained in the code of the Visigoths, viz. that of the writings of the other jurists only those passages were valid which had been adopted in the works of the above-named five jurists. As to the different explanations of the Law of Citations, cp. Puchta, *Cursus der Institutionen*, § 134; Danz, *Lehrbuch der G. des röm. R.* (2nd ed.), § 78; Dernburg, *Die Institutionen des Gajus*, p. 110 ff.; Karlowa, *Röm. RG.*, vol. i. pp. 933, 934. The view here set forth has been controverted by Ferrini, *Storia delle fonti di Diritto Romano* (Milano, 1885), p. 112 ff.; and A. Pernice, *ZS. der Sav. St.*, vol. vii. p. 155.

Sabini, Juliani atque Marcelli, omniumque quos illi celebrarunt, si tamen eorum libri propter antiquitatis incertum codicum collatione firmentur. Ubi autem diversae sententiae proferuntur, potior numerus vincat auctorum, vel si numerus aequalis sit, ejus partis praecedat auctoritas in qua excellentis ingenii vir Papinianus emineat, qui ut singulos vincit, ita cedit duobus. Notas etiam Paulli atque Ulpiani in Papiniani corpus factas (sicut dudum statutum est) praecipimus infirmari.[2] Ubi autem pares eorum sententiae recitantur, quorum par censetur auctoritas, quod sequi debeat, eligat moderatio judicantis. Paulli quoque sententias semper valere praecipimus, &c.

The jus (vetus) was traditionally taken to include those collections of early imperial ordinances, more especially of rescripts, among which the Codex Gregorianus—published about 300 A.D., and probably compiled at Berytus [3]—and the Codex Hermogenianus—a later collection supplementing the former, and published in the course of the fourth century—were pre-eminent.[4] Their practical value lay in the fact that they contained such rescripts (including the numerous rescripts of Diocletian) as the classical jurists had not yet been able to take into account.

The real type of the new imperial law (leges) was the 'edictum', in the later sense of the term, the 'constitutio generalis' promul-

[2] In the year 321 A.D. the Emperor Constantine, with a view to cutting short 'perpetuas prudentium contentiones', had interdicted the use of Ulpian's and Paulus's critical notes on Papinian's works (fragments of which have been recently discovered, cp. *ZS. d. Sav. St.*, vol. ii. p. 86 ff.; vol. v. pp. 175 ff., 185 ff.). He had, however, ratified the use of Paulus's other writings, especially the 'Sententiae', which, it may be noted, are expressly mentioned at the end of Valentinian's Law of Citations (cp. text, above), l. 1. 2 C. Th. de resp. prud. (1, 4). It is clear that as early as the beginning of the fourth century, all the writings of the famous jurists, and not merely their responsa, were used in the tribunals, and that the parties were in the habit of bringing into court and submitting to the judge the particular legal work upon which they relied (l. 2 cit.: in judiciis prolatos). Accordingly the need for a systematic arrangement of excerpts from the writings of the jurists (cp. note 1) became all the more urgent. Such an arrangement would make it much easier to show the judge all the passages bearing on the arguments. A private compilation of this kind, dating probably from the end of the fourth century, has been preserved to us (partially at least) in the so-called Fragmenta Vaticana—a collection of excerpts from the jurists (Papinian, Ulpian, Paulus), together with some imperial constitutions, arranged according to their subject-matter. (Cp. Karlowa, *Röm. RG.*, vol. i. p. 969 ff.)

[3] Mommsen, *ZS. d. Sav. St.*, vol. xxii. p. 139 ff.

[4] There was an earlier collection of rescripts by one Papirius Justus, called the 'libri xx constitutionum', and compiled in the second half of the second century. These rescripts were also considered as belonging to the 'jus', and were, for that reason, extracted by Justinian in his Digest (e. g. l. 60 D. de pactis 2, 14).

gated to the public. All that these constitutions of the new kind, as well as the rescripts of the post-classical period, required was that they should be collected, and this want was supplied by the Codex Theodosianus, published by the Emperor Theodosius II in 438 A.D., and promulgated in the same year with statutory force for the Western Empire by Valentinian III. It contained the constitutiones generales issued since Constantine, and at the same time abrogated all such constitutions of the same period as had not been adopted.

Between the Codex Theodosianus and Justinian a series of separate imperial laws were issued. They were known as 'Novels', and were collected under that name (the so-called Post-Theodosian Novels).

The following sources of law were thus in use at Justinian's time: (1) the writings of the jurists, as determined by Valentinian's Law of Citations; (2) the earlier imperial ordinances (Codex Gregorianus and Codex Hermogenianus); (3) the Codex Theodosianus and its Novels.

These are the materials out of which our Corpus juris was constructed.[5]

II. The Corpus juris of Justinian.

The Emperor Justinian, who reigned from 527–565 A.D., conceived the plan of consolidating the entire existing law in a single code. For this purpose he caused two collections to be prepared, one of the 'jus', or jurist-made law, the other of the 'leges', or emperor-made law. A short textbook (the 'Institutiones', or 'Institutes') was prefixed to the whole by way of introduction to the code and the study of law. Thus the code was divided into three parts: the Institutes, the Digest (or Pandects), and the Code (Codex).

[5] The so-called Syrio-Roman Book of Law, which was originally written in Greek, and which has survived to this day in a Syrian (as well as an Armenian and Arabic) translation, dates from the period between the Codex Theodosianus and the code of Justinian. It has been edited with a translation and notes by Bruns and Sachau, 1880. The law contained in this book differs in numerous particulars from Roman law. The bulk of these differences is, as Mitteis has shown (*Reichsrecht u. Volksrecht*, p. 30 ff.), of Greek origin. (On this point see Ferrini, *Beiträge zur Kenntnis des römisch-syrischen Rechtsbuchs*, *ZS. d. Sav. St.*, vol. xxiii. p. 101 ff.) The Syrio-Roman Book of Law was very extensively used in the East, where it was not superseded even by Justinian's Corpus juris—a circumstance that testifies to the tenacity with which the national Hellenic law held its own notwithstanding the fact that (ever since Caracalla) Roman law had formally applied to all citizens of the Empire alike. Cp. supra, p. 115.

1. The Institutes.

The Institutes (in four books) are a short textbook of Justinianian law, its contents being partly of an historical, partly of a theoretical character. It was composed by the imperial minister Tribonian, and, under his supervision, by the two professors Theophilus and Dorotheus.[6] It was founded on earlier institutional treatises, e.g. those of Ulpian and Marcianus, but more especially on the Institutes and Res quotidianae of Gajus.[7] Justinian published the Institutes as part of his code, with the same statutory force as the remaining portions.

Const. IMPERATORIAM (prooem. Inst.) of Nov. 21, 533 A.D., the document officially promulgating the Institutes.

Const. TANTA (l. 2 C. de veteri jure enucl. 1, 17) of Dec. 16, 533 A.D., refers (in §§ 11, 23) to the Institutes, and provides that both the Institutes and the Digest shall have statutory force from Dec. 30 of the same year.

2. The Digest (or Pandects).

The Digest (in fifty books) is a collection of excerpts from the writings of the jurists; in other words, a codification of the 'jus' or jurist-made law, prepared, by Justinian's orders, by a commission of professors and advocates under the supervision of Tribonian. In their arrangement of the subject-matter the compilers were, generally speaking, guided by the order of the praetorian edict. The commission was divided into three sections, each of which was instructed to extract a particular group of writings. To the first section was assigned the group of works dealing with the jus civile, 'the Sabinian group,' so called, because the staple of these works consisted of the writings of Sabinus and his commentators. To the second section was assigned the group of works dealing with the praetorian edict, the so-called Edict-group. To the third section was assigned the group of works dealing with separate legal questions and cases, the 'Papinianian group', so called, because in this branch the

[6] It is probable that Dorotheus wrote the first two books, and the last title of the fourth, Theophilus the last two books except the last title. In point of diction, Dorotheus's manner is rather more Byzantine, that of Theophilus is simpler. Cp. Huschke, Preface to his edition of the *Institutes*, 1868; Ed. Grupe, *Zur Frage nach den Verfassern der Institutionen Justinians* (Strassburg, 1889).

[7] Ferrini, *Sulle fonti delle Istituzioni di Giustiniano*, in the *Bullettino dell' Istituto di Diritto Romano*, 1900, fasc. ii. p. 101 ff.; Kübler, *ZS. d. Sav. St.*, vol. xxiii. p. 508 ff.

writings of Papinian and his commentators transcended all others in importance. Each section extracted the works allotted to it so far as they bore on the several legal subjects. Thereupon the whole was consolidated into one work, the excerpts of the three groups being pieced together under each rubric, while some further excerpts from writings which had, in the first instance, been overlooked or rejected were subsequently inserted (the so-called Appendix-group).[8] Inasmuch as the object of the whole undertaking was not to promote historical research, but to produce a practical code of law, the commission was empowered to make alterations in the excerpts they adopted. This is the explanation of the so-called interpolations ('emblemata Triboniani') by means of which the selections from the classical jurists were brought into harmony with the law of Justinian's time.[9] The controversies among the juristic writers were set aside, one view only being accepted—such at least was the intention—in the Digest. All individual features were swept away in favour of a uniform, self-consistent whole.[10] It was but reasonable that Justinian and his advisers should look with pride on their achievement. Their work was, in the main, a success. The results of the development of Roman law extending over more than a thousand years had been summed up. Instead of a wilderness of juristic writings there was a uniform work, easy of survey and methodical in execution. It was forbidden to make any further use

[8] Bluhme, *ZS. für geschichtliche RW.*, vol. iv. (1820) p. 257 ff. Bluhme's conclusions have been attacked by F. Hofmann, *Die Kompilation der Digesten Justinians* (1900), but have been approved by Mommsen, *ZS. d. Sav. St.*, vol. xxii. (1901) p. 1 ff.; P. Krüger, *ibid.* p. 12 ff.; and Jörs, in Pauly's *Real-encyklopädie der klassischen Altertumswissenschaft*, sub verbo 'Digesta'.—All those jurists were drawn upon to whose writings Valentinian's Law of Citations had given the force of law, i. e. the writings of the five great jurists and the writings of the authorities whom they cite. Paulus's and Ulpian's notes on Papinian (supra, note 2) were restored to validity. The Digest commission was expressly exempted from the operation of the rules of the Law of Citations which declared that, where the jurists differed, a majority of voices should decide, c. 1 § 4. 6 C. de veteri jure enucl. (1, 17). The writings of Ulpian, and, in a secondary degree, those of Paulus, constituted the main body of the Digest (supra, p. 100).—As to Lenel's attempt to reconstruct the juristic writings from which excerpts were drawn, cp. supra, p. 104.

[9] Cp. Eisele, *Zur Diagnostik der Interpolationen* (*ZS. d. Sav. St.*, vol. vii. pp. 10, 11, 13, 18); Gradenwitz, *Interpolationen in den Pandekten* (*ibid.* p. 45 ff.); Schirmer, *Die angeblichen Interpolationen bei Scaevola* (*ibid.* vol. viii. p. 155 ff.); Gradenwitz, *Interpolationen in den Pandekten*, 1887.

[10] By means of fifty imperial ordinances—the so-called quinquaginta decisiones—the commission was supplied with the groundwork for settling the controversies in the writings of the jurists.

of the writings of the jurists in their original form, and the imperial selection—an epitome and, at the same time, a revival of Roman jurisprudence—was published with statutory force. Never had a code been prepared from nobler materials.[11]

Const. DEO AUCTORE (at the head of the Corpus juris and in l. 1 C. de vet. jure enucl. 1, 17) of Dec. 15, 530 A.D., instructing Tribonian to undertake the composition of the Digest.

Const. TANTA = const. Δέδωκεν (at the head of the Corpus juris and in l. 2 C. eod.) of Dec. 16, 533 A.D., the document promulgating the Digest with statutory force from Dec. 30 of the same year.

3. The Code (Codex).

The Code (in twelve books) is a collection of imperial constitutions, including both the separate decisions of the old type since Hadrian, and the general ordinances of the new type; in other words, a codification of imperial law (leges). As early as 528 A.D., Justinian had ordered a new code to be compiled on the basis of the Gregorian and Hermogenian codes (which in this instance, then, were counted among the 'leges'), the Codex Theodosianus and the later constitutions. This Code was finished and published in 529 A.D. The subsequent composition of the Digest and Institutes, however, which involved a number of material changes in the law,[12] necessitated a remodelling of the Code. The Code of 529 was repealed and a new Code published in 534. The Code in this its second edition (repetitae praelectionis) is the Code of our Corpus juris. The imperial constitutions which had been admitted were arranged in chronological order under their several titles. Here again, interpolations were, when necessary, resorted to with a view to bringing the contents of the earlier imperial ordinances into harmony with the law prevailing at the time. All earlier constitutions were deprived of validity. Just as the 'jus' had no validity except in

[11] The division of the Digest into seven parts had no significance except in regard to the then system of instruction. Pars prima (πρῶτα) comprises books 1 to 4 (general doctrines); pars secunda (de judiciis) books 5 to 11 (real actions); pars tertia (de rebus scil. creditis) books 12 to 19 (personal actions); pars quarta (umbilicus Pandectarum) books 20 to 27 (pledges, interest, evidence, marriage, guardianship); pars quinta books 28 to 36 (wills, legacies); pars sexta books 37 to 44 (bonorum possessio, intestate succession, &c.); pars septima books 45 to 50 (miscellaneous topics, including the 'libri terribiles', books 47 and 48 on criminal law).

[12] Especially through the 50 decisiones (supra, note 10).

the form of the Digest, so the 'leges' had no validity except in the form of the new Code of Justinian.

Const. HAEC QUAE NECESSARIO (prefixed to the Code) of Feb. 13, 528 A.D., containing orders for the composition of a new Code (the first edition of the Code).

Const. SUMMA REIPUBLICAE (prefixed to the Code) of April 7, 529 A.D., the document promulgating the first edition of the Code.

Const. CORDI NOBIS (prefixed to the Code) of Nov. 16, 534 A.D., the document promulgating the second edition of the Code with statutory force from Dec. 29 of the same year.

The Corpus juris of Justinian was thus finished. The entire positive law had been cast into a final shape. All three parts, Institutes, Digest, and Code, though published at different dates, were to have equal validity as parts of one and the same code of law. With a view to preventing new controversies, the writing of commentaries was forbidden. All doubtful points were to be referred to the emperor himself for decision. This explains the necessity for new constitutions (novellae constitutiones), which were already issued, in fairly large numbers, by Justinian himself (535–565 A.D.). These 'Novels' were afterwards collected (supra, p. 21). The collection of Novels which was used by the Glossators at Bologna (the Authenticum) was 'received' in Germany in the sixteenth century as the fourth part of the Corpus juris.

§ 22. *The Result.*

When Justinian composed his Corpus juris, Western Europe was in the hands of the German tribes who had founded their kingdoms on the ruins of the Western Empire. In these kingdoms, however, German law only applied to the conquering Germans, and not to the subject Romans, except so far as the constitution of the State came into question. Thus, in the German kingdoms of the Goths, Burgundians, Franks, &c., the force of Roman private law, criminal law and law of procedure remained, on principle, unimpaired, as far as the Roman-born section of the population was concerned. The German kings had therefore some motive for protecting Roman law, and thus it happened that, even prior to Justinian, precisely the same thing took place in the German kingdoms as Justinian afterwards accomplished for the East-Roman Empire, viz. a codification of Roman law. It is noticeable how the tendency of Roman law, ever

since the fifth century, pointed more and more markedly in the direction of codification, i.e. of a comprehensive summing up of the law in a single book which should facilitate the administration of justice. No sooner had a strong and efficient government sprung into being, whether in the East or the West—and as regards the West, the establishment of the German kingdoms was equivalent to a political regeneration—than the codification of Roman law forced itself upon it as something necessitated, as it were, by the very nature of the circumstances.

It was thus that about the year 500 A.D. (i.e. about thirty years prior to the Corpus juris of Justinian) the so-called Leges Romanae, comprehensive records of Roman law, came into existence in the German kingdoms. Opposed to the 'Leges Romanae' were what we call nowadays the 'Leges Barbarorum', i.e. the records of German tribe-law. The Lex Romana applied to the Roman, the record of German law (the Lex Burgundionum, Visigothorum, &c.) to the German members of the respective kingdoms.

Leges Romanae of this kind were compiled in three German kingdoms, viz. those of the Ostrogoths, Burgundians and Visigoths. The Edictum Theodorici by Theodoric the Great, which probably dates from the years 511–515 A.D., is the Lex Romana of the Ostrogoths;[1] the Lex Romana Burgundionum (also called 'Papian'), issued by King Gundobad about 500 A.D., is the Lex Romana of the Burgundians;[2] and the Lex Romana Visigothorum (also called 'Breviarium Alarici'), issued by King Alaric II in 506 A.D., is the Lex Romana of the Visigoths.[3]

The task which these German kings had set themselves to perform was the same as that undertaken by Justinian. But the difference in the results they respectively achieved was immense.

The Leges Romanae of the Ostrogoths and the Burgundians are nothing more than lame attempts to set out in a brief form the

[1] The Edictum Theodorici has this peculiarity that it was intended to apply not only to the Roman, but also to the Gothic subjects of the kingdom. The notion still prevailed here that the kingdom of the Ostrogoths formed a portion of the Roman Empire and that the Goths, being Roman soldiers, were, in their dealings with Romans, governed by Roman law as the existing law of the land. See, on this Edict, Brunner, *Deutsche Rechtsgeschichte*, vol. i. (1887) p. 365 ff.

[2] Cp. Brunner, *loc. cit.* p. 354 ff. As to the name 'Papian' (a mutilation of Papinian), cp. infra, note 5.

[3] Cp. Karlowa, *Röm. RG.*, vol. i. p. 976 ff.; Brunner, *loc. cit.* p. 358 ff.; Krüger, *G. d. Quellen*, p. 309 ff.

principal provisions of Roman law so far as they appeared to be of practical importance. The Edict of Theodoric attempts to formulate matters in its own way, so that, in this respect, the Lex Romana Burgundionum has a certain superiority over it, in that it adheres more closely to the Roman originals. It is possible that, in both cases, the compilers availed themselves of so-called summaries, i. e. brief *résumés* of the authorities accompanied by explanatory notes, such as had sprung up in the literature of the fifth century in connexion with the teaching of law.[4] But the spirit of Roman law has completely vanished from both these codes. What is here presented to us is a mere wreck. In the great invasion of the barbarians, which swept like a hurricane over the West, only the coarsest part of the materials has been rescued; all that is implied in artistic treatment, beauty of form, and wealth of ideas has perished. What remains is but a tarnished torso, mutilated and insignificant. Not a trace is left of the grandeur and splendour of bygone times. In fact the self-consciousness of Roman law itself has perished. In both Leges we observe a strong tendency to absorb ideas of German law. German law already constitutes the stronger portion of the codes; its victorious career is about to commence. Nor had it any cause to dread the rivalry of such Roman law as was embodied in these two Leges Romanae. Roman law of *that* kind would never have subdued the world.

From the Lex Romana Visigothorum, however (the 'Breviarium Alarici'), we carry away a different impression. Thanks to its geographical position Spain had enjoyed a greater immunity from the ravages of the Germanic invasion than any other portion of Western Europe. It was in Spain, then, and the part of Gaul which lay south of the Loire and which belonged to the Visigoths till 507 A. D., that the genuine spirit of Rome maintained its last energies. King Alaric, in composing his Corpus juris Romani, had very different intellectual powers at his disposal from Theodoric, though the kingdom of the latter included Rome itself. Hence the wide difference between the Hispano-Gallic Corpus juris and that of the Ostrogoths. The system upon which the Lex Romana Visigothorum was composed was similar to that subsequently adopted by Justinian. Without attempting to expound Roman

[4] We still possess 'summaries' of the Codex Theodosianus of this kind. Cp. Karlowa, *Röm. RG.*, vol. i. p. 963.

law in a form of their own, the compilers preferred to collect excerpts from the traditional sources of Roman law which were well fitted to preserve, not only the substance of Roman law, but also its classic form. The greater part of the Lex Romana Visigothorum consists of the Codex Theodosianus together with the Post-Theodosian Novels in an abbreviated form, a number of constitutions being omitted. The Codex Theodosianus (which represents the 'leges') is followed by portions of the 'jus', viz. the Institutes of Gajus in an abridged form, compressed into two books (the so-called West Gothic Epitome of Gajus), the 'Sententiae' of Paulus, portions of the Gregorian and Hermogenian codes and—for courtesy's sake—a passage from Papinian by way of conclusion.[5] The rule followed was to leave the selected passages unaltered, but to accompany them with an 'interpretatio', which regulated in a sensible manner the application of Roman law in the kingdom of the Visigoths (a kind of Gothic Usus modernus Pandectarum), the compilers perhaps availing themselves—in parts, at least—of summaries such as were to be found in juristic literature.[6] The 'liber Gaji' alone has no interpretatio. The commission had found and adopted Gajus's work in an abbreviated form—the form, namely, of an epitome that had been prepared for purposes of contemporary legal instruction—and it was thought that no further 'explanations' were required to adapt it in this form to the existing state of the law and the general understanding of the people.[7]

We see, then, that the sources of law which were here drawn upon and reproduced were very different from those used in the Leges Romanae of the Ostrogoths and Burgundians. The best portions, at any rate, of the imperial law were saved, and an attempt, at least, was made to preserve as existing law some parts of classical Roman jurisprudence. The consequence was that, with the destruction of the kingdoms of the Ostrogoths and Burgundians, their codes ceased to have any further practical

[5] In the MSS. the Lex Romana Burgundionum was frequently joined on immediately to the Lex Romana Visigothorum, so that the heading of the last section of the Lex Visigothorum (Papinian. lib. i. responsorum) was taken to refer also to the Lex Romana Burgundionum. Hence its name 'Papian' (i. e. Papinian), which occurs as early as the ninth century. Cp. Brunner, *loc. cit.* pp. 356, 357.

[6] Cp. Fitting, *ZS. für RG.*, vol. xi. (1873) p. 222 ff.

[7] As to the West Gothic Epitome of Gajus cp. H. F. Hitzig, *ZS. d. Sav. St.*, vol. xiv. p. 187 ff.

importance, whereas, on the other hand, the Breviarium Alarici maintained its vitality in Western Europe in spite of the fact that, as regards Spain itself, it was set aside in the seventh century by the union of Romans and Goths under a single code, the remodelled Lex Visigothorum. The Roman Breviarium Alarici became the Lex Romana of Western Europe, and, down to the eleventh century, it exercised in this capacity (though frequently only through the medium of inferior abstracts) a dominant influence upon Romance law in Southern France and some parts of South Germany (viz. Upper Rhaetia). Even in the German convent-schools (e. g. St. Gall, Reichenau) the Breviarium was used in the early Middle Ages (tenth and eleventh centuries), in addition to the records of German law, as the foundation of the teaching of Latin, and, at the same time, of the teaching of law.[8] With regard to Italy, however, the conquest of that country by Justinian, though only temporary, had nevertheless resulted in its adopting the Corpus juris of the Eastern Empire. Thus, from the sixth century onwards, the Corpus juris of Alaric, king of the Visigoths, and the Corpus juris of Justinian confronted each other as rivals, the former predominating in the West, the latter in the East. Which was to be the Corpus juris civilis of the future?

The question was decided in favour of Justinian's code. The school of Glossators who revived the study of Roman law in Italy in the twelfth century took Justinian's Corpus juris (which was in force in Italy) as their starting-point, and with the triumphant spread of Italian jurisprudence the East-Roman Corpus juris found its way to the West. The Corpus juris of the German king was destroyed by the Corpus juris of the emperor of Byzantium.

It would, however, be erroneous to suppose that the decision in favour of Justinian's Corpus juris was due to a mere accident of history. It was rather the intrinsic value of what Justinian had done that found outward expression in the success which attended his work. And the intrinsic value of Justinian's achievement consisted in this that, in his compilation, the juristic *literature* of the

[8] Fitting, *ZS. d. Sav. St.*, vol. vii. pp. 86-90; Fitting, *Die Anfänge der Rechtsschule zu Bologna* (1888), p. 31.—During the Carlovingian period there was a revival of scientific interest in law in the Frankish Empire, and attention was devoted to the original sources of Roman law, particularly to the Codex Theodosianus. The Breviarium had no exclusive authority as law in the Frankish Empire. Cp. Mommsen, *ZS. d. Sav. St.*, vol. xxi. p. 155.

Romans had been successfully mastered; in it, the true spirit of Roman jurisprudence had been grasped and preserved for future ages by means of the excerpts embodied in the Digest. Important as the practical influence of imperial legislation had been in moulding the law, nevertheless it is not there we must look for the seat of that strength which guaranteed Roman law its indestructibility. What was so entirely unique in the achievements of the Roman lawyers was, simply and solely, their masterly treatment of the casuistry of private law: while tracing the laws underlying each separate case, they contrived to exhibit the elements and, at the same time, the fundamental principles, inherent in those elements, of private dealings in general, and particularly of such as result in the creation of an obligation. They solved the great problem of reconciling a free, equitable discretion with fixed rules; of giving effect to the concrete individual intention while, at the same time, insisting on its necessary subjection to the immutable laws inherent in it. It was in the writings of the Roman jurists alone that this masterpiece of Roman law had been accomplished. Whoever, therefore, had mastered the Roman jurists had mastered what was true, genuine, and imperishable in Roman law. But it was not everybody that could master and understand the jurists, as we see most conspicuously in comparing Justinian's code with the others. Even the compilers of King Alaric's code had found the great works of Papinian, Ulpian, Paulus, &c. difficult and unintelligible. They were content with the light fare with which the short 'maxims' (sententiae) of Paulus and the Institutes of Gajus, in their abridged form, supplied them. They had thus renounced what constituted the real strength of Roman jurisprudence. In the main, therefore, the Lex Romana Visigothorum is nothing more than a collection of ukases, of imperial constitutions. Roman law, in this shape, was as unfit to be 'received' in Germany as it was in the shape of the other Leges Romanae. But it was different with the advisers and professors of Justinian: *they* were still qualified to read and extract the great jurists with intelligent appreciation. It was in *their* Corpus juris alone that Roman law stood forth in all its splendour and world-subduing power. The Corpus juris of Justinian, and it alone, has preserved, and rescued for all future ages, the great masterpiece of Roman jurisprudence. In this form, and in no other, could Roman

law be received in Germany. And so it actually happened. Thus we are still living in this as in other respects on what the intellectual forces of Byzantium accomplished for us by preserving and transmitting the treasures of antiquity.

This, then, was the great feat which Justinian had achieved by his Corpus juris. Roman law, as a work of art, had been definitely finished, and had, at the same time, been cast into a comprehensive form which saved it from destruction. No matter now whether the Roman State perished or not, Roman law was strong enough to survive the Roman Empire.

CHAPTER III

THE SUBSEQUENT FATE OF ROMAN LAW

§ 23. *Byzantium.*

With the completion of the Corpus juris the energies of the East-Roman Empire were exhausted as far as the scientific treatment of law and the power to produce new law were concerned. The literature of the period was confined, for the most part, to Greek translations of single parts of the Corpus juris or to attempts (of a very superficial kind) to reproduce the contents of those parts either (abridged) in the shape of abstracts or else in the shape of explanatory 'paraphrases'.[1] In a few exceptional cases monographs were written dealing with particular legal topics. This tendency to prune away and dilute Justinian's mighty compilation is reflected in the legislation of the period. It supplies, indeed, the explanation of the Basilica (*τὰ βασιλικά*), which were composed towards the close of the ninth century. The Basilica were commenced by the Emperor Basilius Macedo (867–886 A. D.) and were carried to completion by his son, Leo Philosophus (886–911 A. D.). They consist of a reproduction, in an abridged form, of the contents of the Corpus juris in sixty books, and are based on the translations and abstracts of the sixth century.[2] Following the example of the Institutes, the Emperor Basilius prefixed an introductory part called the *Πρόχειρον*, which was afterwards revised and republished by Leo under the name of *Ἐπαγωγὴ τοῦ νόμου*. The Basilica retained thenceforth in theory their statutory authority, though in reality there was a steadily increasing tendency to replace them in practice by epitomes. The last successful work of this latter kind was the Hexabiblos of Harmenopulos (1345 A. D.), a 'miserable

[1] For example, Theophilus (as to whom see supra, p. 122) wrote a paraphrase of the Institutes, and Stephanus, another contemporary of Justinian, a paraphrase of the Digest.

[2] They have been edited by E. Heimbach, *Basilicorum libri LX*, 7 voll., Lipsiae, 1833–97. Volume ii contains a *Supplementum*, ed. C. E. Zachariae a Lingenthal (1846); volume vii a *Supplementum alterum*, ed. E. C. Ferrini, J. Mercati (1897).

epitome of epitomes of epitomes'.[3] As a matter of fact the law set forth in the Hexabiblos was the Roman law of the expiring Eastern Empire. The Hexabiblos, however, survived the rule of the Turks, and in 1835 was clothed with statutory force for the Kingdom of Greece.[4] The history of Roman law in the East is the history of a steady process of decline. The same blight that had fallen on the Empire and the Church had affected the law. What had once been a body full of vital force had shrunk, past recognition, to a mere lifeless form.

A different fate was in store for Roman law in Western Europe, where it was destined to enter on a fresh lease of life.

§ 24. *Italy.*

We have already pointed out (supra, p. 125 ff.) that in the German kingdoms of Western Europe Roman law—in its pre-Justinian form, of course—remained in force, as far as the Roman population of the provinces was concerned, even after the fall of the Roman Empire. That as a matter of historic fact Roman law continued to exist in Western Europe has been conclusively shown by Savigny in his brilliant treatise on the subject,[1] but its continued existence did not differ in character from the continued existence of the Roman language. That is to say, just as the Latin language, after absorbing a number of Germanic elements, grew into the Romance languages, so Roman law became (in Upper Rhaetia and in the South of France) a barbarized Romance law shorn of all the strength of the classical law, to which indeed it bore but a faint resemblance.

Italy was the only country over which Roman law, in its original form, never completely lost its hold. In Italy the traditions of Roman law lived on, not only among the people, but also among the learned jurists, and by this means the connexion with classical

[3] See the article, 'Geschichte u. Quellen des röm. Rechts' (by Bruns, revised by Lenel), in Holtzendorff's *Encyklopädie der RW.*, vol. i. (6th ed., 1902) p. 162.

[4] Among works which have contributed to our knowledge of the history of Graeco-Roman law, special mention must be made of the numerous writings of E. Zachariae, and more particularly of his *Geschichte des griechisch-römischen Rechts*, 1877. An excellent and concise *résumé* of the subject will be found in the article mentioned in note 3 (at pp. 159-162).

[1] *Geschichte des römischen Rechts im Mittelalter*, 2nd ed., 7 voll., Heidelberg, 1834 ff.

legal literature was maintained. The scientific study of law, like ancient culture in general, of which it was part, never entirely died out in Italy. The schools of law which continued to exist—in Rome, and afterwards (in the eleventh century) at Ravenna—preserved the tradition of the legal teaching of the Roman Empire and, with it, no mean portion of the spirit of Roman jurisprudence.[2]

But the scientific jurists of Italy who wrote and taught from the sixth to the eleventh century were out of immediate touch with the law actually in force in their country. They never succeeded in gaining any control over the practical administration of justice. In fact, a complete mastery of so vast a subject as Roman law was beyond their powers. In the main they were satisfied with taking their Roman law from those portions of the authorities which were the easiest to understand, and which, for that reason, contained less valuable matter than the other portions. They showed a preference for the Institutes, on the one hand, and the Novels, on the other, and out of these they were content to put together a summary sketch of Roman law, just as their fellow jurists were doing at Byzantium about the same time. They were, however, intellectually incapable of coping with the principal part of the Corpus juris, viz. the Digest. And yet it was precisely within the field of the Digest that the great achievement which stands in history to the credit of the Italian jurists was afterwards accomplished.

A new force was required in order to free the study of Roman law in Italy from the Byzantine manner and to fill it with fresh life. It was a singular coincidence that this vitalizing force should have been supplied by the German peoples and by German law, for it was just the extraordinary success of the scientific study of Roman law which, at a subsequent period, threatened German law itself with extinction.

The Lombards were distinguished beyond all the other tribes of

[2] Much light has been thrown on the literature referred to—as to the value of which opinions differ—by the numerous writings of Fitting (e. g. *Über die sogenannte Turiner Institutionenglosse u. den sogenannten Brachylogus*, Halle, 1870; *Anfänge der Rechtsschule zu Bologna*, Berlin, 1888) and by Conrat (writing in opposition to Fitting) in his *Geschichte d. Quellen u. Litteratur d. röm. Rechts im früheren Mittelalter*, vol. i, Leipzig, 1891. Besides these, reference should be made more particularly to Ficker's *Forschungen zur RG. Italiens*, vol. iii. (1870) pp. 110 ff., 125 ff., 299 ff., and to Ficker, *Über die Entstehungsverhältnisse der Exceptiones Legum Romanarum*, Innsbruck, 1886 (as to which see Fitting, *ZS. d. Sav. St.*, vol. vii. pt. 2, p. 27 ff.).

German nationality by the remarkable degree to which the legal instinct was developed in them. Not only could they boast a body of statute-law, vigorously worked out and clearly enunciated—the Edicts of the Lombard kings and the Capitularies of the Franconian kings—but from an early time they set themselves consciously to the task of applying the text of the statutes in a rational manner. The assessors (judices) of the Royal Court at Pavia became the representatives of a school of German (i.e. Lombardic) law which flourished in the tenth and eleventh centuries. It is to them that we owe the Liber Papiensis—a collection of the edicts and capitularies arranged, in the first instance, in chronological order, and afterwards systematically arranged in the so-called 'Lombarda'—as well as the glossae and formulae for actions by which this Corpus juris Langobardici was more fully explained. Their labours culminated about the year 1070 A. D. in a complete commentary on the Liber Papiensis called the 'Expositio'—a highly creditable achievement to which the contemporary school of Roman law could offer no parallel.[3]

It almost looked as if German law were about to beat Roman law out of the field, not only in practical life, but also as a subject of scientific study. The success of Lombardic jurisprudence was, however, destined to instil fresh life into Roman law.

§ 25. *The Glossators.*

In the second half of the eleventh century the method of the Lombard jurists was applied in Bologna to the Roman Corpus juris. The success with which the Bolognese School of Glossators worked this method enabled them to restore Roman jurisprudence to fresh power and dignity and, at the same time, to lay the foundations on which modern German jurisprudence rests. The credit of having founded the School of Glossators has been assigned to Irnerius,[1] who flourished about 1100 A. D. The most distinguished among his successors were the 'quattuor doctores', Martinus, Bulgarus, Jacobus,

[3] The Expositio is discussed by Boretius in the *Monum. Germ. Legum*, tom. iv. p. lxxxiv sqq. As to the administration of justice among the Lombards, see *ZS. d. Sav. St.*, germ. Abt., vol. i. pp. 23, 24.

[1] A certain dominus Pepo (who lived about 1070 A. D.) is mentioned as a predecessor of Irnerius; cp. Savigny, *G. d. röm. R.*, vol. iii. p. 427; vol. iv. pp. 6, 7. Fitting, *Pepo zu Bologna*, *ZS. d. Sav. St.*, vol. xxiii. p. 31 ff.

and Hugo (who were contemporaries of Frederick Barbarossa) and, in the first half of the thirteenth century, Azo, Accursius, and Odofredus. The jurists of the earlier school of Ravenna (supra, p. 134) had taught Roman law by means of comprehensive epitomes and manuals. The Glossators of Bologna, on the other hand—and it is this that distinguishes them from the teachers of the earlier school[2]—adopted the exegetic method practised by the Lombard jurists; that is to say, they dealt with the provisions of the Corpus juris *in detail* by means of *glossae*, or explanatory notes appended to the text of the Code. The most fruitful part of the work done alike by the Lombard jurists in dealing with the Liber Papiensis and by the Glossators in explaining the several passages of the Corpus juris consisted in the searching out of what are known as 'parallel' passages, that is, the various other passages connected with the particular passage under discussion. It is remarkable how much light the Glossators were able by this means to throw on the provisions of Roman law. Their explanations went far deeper than any mere elucidation of the letter of the law; they served to reconcile contradictions and to bring such parts as were mutually related into vital connexion; they took account of the system of Roman law as a whole without neglecting any single detail. The need for a compendious survey of the results achieved gave rise to the so-called Summae which were also apparently modelled on similar works by the Lombard jurists. The strength of the school lay in the before-mentioned *glossae*. Undeterred by the difficulties of the task, Irnerius and his followers boldly set themselves to analyse the countless provisions of the Corpus juris, and by the use of genuinely scientific methods they were able to bring to light the wealth of legal treasure that lay embedded there. They accomplished what nobody had accomplished before, for it is to their efforts that the modern world owes its intellectual mastery over the vast materials of the Corpus juris. By dint of unremitting labour they succeeded in bringing out the full significance of the priceless work contained in the Digest, and in revealing the noble fabric of Roman law, not merely in separate sections, but as a great whole. The Glossators re-discovered the Digest in the sense that they brought home its meaning—and, with it, the meaning of Roman jurisprudence—to the minds of men once more, and at the same time, by means of

[2] Ficker, *Forschungen zur RG. Italiens*, vol. iii. p. 139 ff.

a magnificent exegetical apparatus, they secured all future generations in the enjoyment of the fruits of their labours. What the Glossators have thus accomplished is work done once and for all, and it entitles the School of Bologna to rank for all time to come as one of the mightiest forces in the history of Roman law.

The 'Glossa ordinaria' of Accursius (about 1250 A. D.), in which the results achieved by the Glossators were finally and comprehensively summed up, marked the completion of the special work of their school: there is necessarily a point at which a scientific process working exclusively on exegetic lines must come to an end. The Glossators had succeeded in showing once more what the provisions of pure Roman law, of the Corpus juris, actually were, so far as it was possible to do so by a method of inquiry and explanation which confined itself strictly to the contents of the code itself.

But in order to place pure Roman law in a position to exercise an influence on practical life a mere re-discovery of its provisions was not sufficient. It would be the greatest mistake to suppose that any sudden reform in the application of law took place at the time of the Glossators. In Italy as elsewhere the law continued for the present to be administered on the old lines, and the importance of the results effected by the Glossators was at first rather theoretical than practical.[3] The law of the Corpus juris had to undergo a process of modification and adaptation before it could be actually applied in the Courts and resume the commanding position in the civilized world that had once belonged to it: ancient Roman law had to be suited to the altered conditions of mediaeval life.

One step in this direction was taken by the Glossators themselves. Among the 'authenticae', or excerpts from the laws of the later Roman emperors which they inserted in the text of the Codex (supra, p. 21), we find some that are based on laws of the German

[3] The archives of the Italian Courts do not show any traces of the effects of the School of Bologna till towards the close of the twelfth century, and even these effects are of a very limited character; cp. Ficker, *Forschungen*, vol. iii. p. 299 ff. Thus Boncompagnus tells us in his *Rhetorica novissima* (published in 1235 A. D.) that 'per ipsum' (i. e. jus civile) 'vel cum ipso non regitur centesima pars orbis terrarum; ... per statuta rusticorum jugiter evanescit et plebiscita popularia sibi auctoritatem subripiunt et favorem'. The author accordingly feels a cordial dislike for the 'Lombarda': 'non debet dici lex, immo potius fex.' See Seckel, *ZS. d. Sav. St.*, vol. xxi. p. 333.—The direct influence exercised by the Glossators on the general ideas of their contemporaries by their revival of the notion of the Roman emperorship was more considerable.

them, German legal ideas exercised a most powerful influence on the Canon law. Roman procedure and Roman criminal law were in fact transformed into the procedure and the criminal law of the Canon law. It was in the altered form given to them in the Corpus juris canonici that Western Europe, at a subsequent date, received not only the law of procedure and the criminal law of the Corpus juris civilis, but also, in the main, the private law of Rome. The Papal Code represented a kind of revised version of the ancient Imperial Code in which the law of the Roman emperors was made intelligible to the Middle Ages and was fitted for practical application.

It must, however, be borne in mind that the Canon law as such was not recognized in the secular, but only in the ecclesiastical courts. The Church was not strong enough to effect unaided such a reform of Roman law as would have enabled it to be applied in the secular courts.

In this instance again it was from the scientific jurists that the development of Roman law received its decisive impulse.

§ 27. *The Commentators.*

From the middle of the thirteenth century onwards the School of Glossators was replaced by the School of Post-Glossators or Commentators, whose ablest representatives — Cinus, Bartolus, Baldus—lived in the fourteenth century. The School of Post-Glossators, which had its principal seats at Perugia, Padua, and Pavia, represents the second phase in the evolution of Italian jurisprudence. The importance of this phase has been largely misjudged owing to a tendency to measure the services of the Post-Glossators merely by what they have contributed towards a better understanding of the Corpus juris civilis.[1] Judged by this test it is quite true that the jurists in question can claim little merit of their own; they are mere imitators, fitly described as 'Post-Glossators'; distinguished—and very unfavourably distinguished—from their

[1] This is the position taken by Savigny in his *Geschichte d. röm. R.* (vol. vi. p. 1 ff.). Naturally enough, therefore, he is somewhat surprised to note (*ibid.* pp. 11, 12) that the very same men who (like Cinus, e.g.) took an active part in the revival of the national literature of Italy during the fourteenth century should (as he thinks) represent a period of steady decline in the field of jurisprudence.

predecessors solely by the fact that, instead of writing short explanatory notes (glossae) on the several passages of the Corpus juris, they indulge—as their name 'Commentators' betokens—in long-winded commentaries teeming with scholastic 'distinctions',—commentaries, moreover, which do not even comment on the passage upon which they profess to be founded, but are really exhaustive disquisitions on doctrines having no inner connexion whatever with the text (or the gloss on the text) to which they are appended.

We cannot, however, accept this estimate as correct. The work which the Commentators were called upon to perform, and did in fact perform, was in truth of quite a different kind.[2] These men never set themselves to explain the Corpus juris at all; in their view indeed, after what the gloss had done, there was nothing more to explain in Roman law. The task to which they addressed themselves was a new one, and a greater one than anything attempted by their predecessors, the task namely of building up, on the foundations furnished by the Glossators, a Roman law which might be applied in actual life and which, as such, might serve (in the first instance for Italy) as a living *common* law.

The time had arrived—it was the fourteenth century—for fusing the various elements, Lombard and Romance, that constituted the population of Italy into a national unity. Dante, Petrarch, and Boccaccio created a national Italian literature. At the same time Cinus, Bartolus, and Baldus created a body of national Italian law. Down to the eleventh and twelfth centuries Lombard law and Roman law continued to exist side by side as distinct systems. In the courts it was virtually only Lombard law that was recognized and applied[3] (in Upper Italy at any rate), and Lombard law was the source whence the various bodies of statute-law, which developed

[2] The views set forth in the text are founded on the convincing arguments of W. Engelmann in *Die Schuldlehre der Postglossatoren* (Leipzig, 1895), p. 1 ff.

[3] In Upper Italy Roman law was superseded by Lombard law in everything but in name. The Cartularium Langobardicum, which was composed about 1000 A. D. at Pavia, regularly recites the provisions of Roman law side by side with those of Lombard law, but observes with equal regularity that the provisions of Roman law coincide with those of Lombard law. Cp. Ficker, *Forschungen*, vol. iii. p. 460, and supra, p. 137, n. 3.—Odofredus (who lived about 1250 A. D.) says: 'Citra Padum servatur jus Romanorum' (this, we may note, was only true in theory), 'ultra Padum servatur jus Lombardorum, et in Tuscia servatur jus Lombardorum.' Cp. Tamassia, *Odofredo*, Bologna, 1894 (p. 134).

with considerable vigour in the city-states of Upper Italy, derived their strength. In literature, on the other hand, it was virtually only Roman law that was taken into account. In the course of the twelfth century the works of the Lombard jurists had been completely cast into the shade by the School of Glossators, and as for the statute-law of the cities just mentioned—that vigorous young offshoot of the Lombard law which the Glossators contemptuously described as irrational law, a 'noisome' thing and the work of 'donkeys'[4]—the scientific jurists simply ignored it altogether. Between the law of practical life and the law with which the jurists concerned themselves there was thus a great gulf fixed. The law recognized in actual practice consisted of the statute-law of the cities, on the one hand, and the Canon law, on the other, though the latter was precluded from exercising any influence on the development either of the city-laws or of Roman law by reason of the fact already noted that its validity was on principle confined to the ecclesiastical courts.[5] Roman law, the statute-laws of the cities, and the Canon law existed side by side, each going its own way without heeding the other. The problem was how to correlate and connect them, and it was this problem that the Commentators successfully solved.

In Italy (including Lombardic Upper Italy) Roman law had traditionally been regarded as the lex generalis or common law. To the Glossators Roman law represented the jus commune. It was the universal law of the world. But it was only in theory that Roman law enjoyed universal authority. Its recognition in the practical administration of justice was due to the Commentators, and it was by insisting on the deeper underlying unity of Roman law and the law actually in force in Italy, and thus working the two systems into a harmonious whole, that the Commentators were able to effect this recognition. In their commentaries on the

[4] Thus Odofredus (using language similar to that of Boncompagnus, supra, p. 137, n. 3) speaks of the 'fetidissimum jus Langobardorum'; the plebeji (he says) who presume to make 'statuta' are just so many 'asini', whose statutes have therefore 'nec latinum nec sententiam'; Roman law alone is rational law, 'lex et ratio.' Cp. Tamassia, *op. cit.* p. 10, n. 1; p. 133.

[5] Odofredus says: 'Illae decretales habent locum in foro clericorum—vel intelliguntur—in illis terris in quibus dom. papa habet utrumque gladium.' The decretals were only allowed to have secular force within the secular territory of the Pope. Cp. Tamassia, *op. cit.* pp. 146, 147.

Corpus juris we find constant references to the statute-laws of the cities, and the result of their work was to import some Lombard customs into Roman law and, conversely, to engraft Roman law to some extent on the Lombard customs. Equal importance was assigned to the Canon law. The fact that the Canon law came to be recognized in the secular as well as in the ecclesiastical courts was due to the way in which the Commentators developed Roman law in accordance with the principles of the Canonists. By thus combining Roman law with the Canon law and with German law, they produced a kind of usus modernus Pandectarum for Italy—a body of law which, though never out of touch with the imperishable work of the Roman jurists, was still sufficiently modernized to admit of application in the existing courts. Thus it came about that (in Italy, in the first instance) German law was finally driven from the field by Roman law, not however by pure Roman law, but by that modernized, Italianized Pandect law which owed its existence to the Commentators. The latter exercised a controlling influence over the administration of justice principally through the medium of their 'consilia'. It was under this influence that Lombard law, as embodied in the statutes of the cities, sank to the level of a mere local law which came to be regarded as a defective law, a law which, taken by itself, could not be rightly understood, and which had therefore to be supplemented and interpreted by the aid of the Pandect law (in other words, Roman law) in that modified form which the new jurisprudence had given to it. Italy thus obtained for the first time a common law recognized in actual practice; that is, a common law supplementary to the statute-laws of the cities, which the courts were bound to take into account in the administration of justice. The growth of this common law gradually deprived the statute-laws of all their vitality. It is true there was a rule that, in case of conflict, statute should override jus commune, just as afterwards in Germany territorial law was said to 'break the common law'.[6] But there was a further rule—and the fact that the statute-laws came to be treated as incomplete laws which required supplementing was due to the application of this very rule as a canon of interpretation[7]—the rule, namely, that the

[6] Thus Dinus says: 'Per poenam statuti tollitur in totum poena juris communis.' Engelmann, *op. cit.* p. 238.

[7] 'Statuta debent servari ad literam,' says Tartagnus. And Albericus:

operation of a statute should be rigorously limited by its letter, that is to say, by what the statute expressly and in so many words provided for. And in interpreting the 'letter' of the statutes there was a growing tendency, all reservations notwithstanding, to give effect to the ideas of the new common law.[8] The victory of the common law was thus assured. Its strength lay in the fact that it was founded on scientific principles, and its signal practical triumph was due to the special labours of the Commentators. Just as the growth of a common national art and literature tended to reduce the differences of language and national character in Italy, so the success of the new scientific movement tended to reduce the existing differences in the law and to bring unity into the legal ideas and habits of the people.

The new common law which had grown up under the hands of the Commentators had proved itself capable of serving as a common law for Italy. But its importance was not to be confined to Italy. It was—as the events proved—strong enough to exercise a dominant influence throughout the civilized world. And in this instance

'Statuta sunt stabiliter, firmiter et tenaciter observanda, nec ab eorum verbis est recedendum, quia sunt stricti juris.' But by saying that the statutes are stricti juris Albericus means that they only apply so far as the letter of their provisions goes, and no further. Accordingly Gandinus tells us that 'statuta terrarum sunt stricti juris et sterilia tamquam mulae, et sic nullam interpretationem et subauditum intellectum recipiunt, sed secundum eorum verba juxta grammaticalem intellectum stricte et rigide sunt intelligenda'; Engelmann, *op. cit.* pp. 236, 237. That is to say, where a statute, on the face of it, makes no provision for a case, the defect cannot be supplied by looking to the statute itself and examining its purport as a whole; for if, on a literal reading, the statute says nothing about a case, it is in fact *pro tanto* defective and must be supplemented by the common law. The statute-law was, of course, originally conceived as a body of law complete in itself and operating accordingly, but this, the natural view of its effect, was destroyed by the growth of the common law.

[8] Thus Gandinus says: 'Secundum veriorem intellectum et opinionem communem Doctorum statuta intelleguntur secundum determinationem juris communis et ejus interpretationem.' And Baldus: 'Statutum debet intellegi, prout est possible, secundum jus commune; statuta restringuntur per rationem juris communis.' The saying 'litera occidit, spiritus autem vivificat' was applied to the letter as well as to the spirit of the Statute. Cp. Engelmann, *op. cit.* p. 238 ff. In striving to enforce their view of the effect of the statute-law—Engelmann (*op. cit.*) has thrown some very instructive light on this phase of the development—the Commentators were practically fighting the battle of the common law. For the fact that the law taught by the Commentators ever became the actual common law of the country was the outcome of this very theory that the statutes should not be interpreted in the light of the statute-law itself, but in the light of the common law.—Cp. also J. Kohler, *Beiträge z. Geschichte d. röm. R. in Deutschland*, Heft 2 (1898), p. 33 ff.

again it was the Commentators from whose labours the historical development of the law received its decisive impulse. For it was the Commentators who introduced scholasticism into the science of law.[9]

The essence of scholasticism consists in the predominance of the deductive method; in other words, in the predominance of abstract conceptions. The schoolman heeded neither experience nor observation; principles founded on pure reason were all he cared about. For him speculative philosophy was everything. Science, he held, is not concerned with anything but what can be logically deduced from the most general conceptions. Only what is rational, *is*. From the scholastic point of view even the rules of grammar required demonstration and had therefore to be derived by logical conclusions from general principles.[10] A passion of pure intellectualism seized the minds of men, and dialectics dominated everything. The world of being was forgotten, and the world of thought reigned supreme.

We are apt nowadays to associate scholasticism principally with some of its least favourable features. The schoolmen's way of playing with abstract conceptions, their prolix and frequently quite barren disputations pro and contra, their obvious lack of sense for the realities of life—all these characteristics repel us. But at the time of which we are speaking scholasticism, which then stood at the height of its influence, was a source of new light to the mediaeval world. Trained in the methods of Aristotle, the great master of antiquity, men attained for the first time to a consciousness of the power of thought. They had been prone hitherto to view things in a sensuous, concrete way, and it was scholasticism that first revealed to them the true force of Mind, that force which,

[9] An admirable account of the nature and history of scholasticism is to be found in G. Kaufmann's *G. der deutschen Universitäten*, vol. i. (1888) p. 1 ff. The victory of the scholastic mode of thought was due to Abélard, who died in 1142 A. D. Paris became the leading centre of scientific scholasticism (Kaufmann, pp. 46, 49). The scholastic method was first applied to jurisprudence by French jurists in the second half of the thirteenth century (Savigny, *Geschichte*, vol. v. p. 603 ff.). Afterwards, in the first half of the fourteenth century, Cinus imported the scholastic jurisprudence of the French (or 'moderni', as they were called) into Italy. Cinus's work was continued by the other Italian jurists, more particularly by his famous pupil Bartolus, and by Baldus, a pupil of Bartolus. Cp. Savigny, *Geschichte*, vol. vi. pp. 88, 155; Engelmann, pp. 11, 12.

[10] Cp. Kaufmann, *op. cit.* p. 23 ff.

out of itself, brings forth all that is real. Where scholasticism erred was in supposing that logical inferences could take the place of observation. But the importance of scholasticism, not only for its own time, but for all future ages, consists in the fact that it gave scientific expression to an ever-living impulse of human nature, the impulse, namely, to bring the blind mass of matter under the all-comprehending control of mind. In our own times science wears a very different aspect: observation of nature, historical inquiry, a consciousness of the eternal 'flux of things', have changed its character. But no science will ever rest content with mere matters of fact: what the schoolmen attempted will be attempted again and again as long as a science exists, and men will endeavour to grasp the world of reality through the universal and the abstract, and, having observed the phenomena presented to them, they will seek to bring these phenomena under the mastery of an idea. In its essence scholasticism contains a portion of the essential nature of all science whatsoever, including the science of our own times.

It was from France that scholasticism had found its way to Italy, and in the fourteenth century the Italian Commentators applied the scholastic methods to the science of law. The foundations of modern Continental jurisprudence were thus laid. The Commentators were no longer satisfied with merely ascertaining and elucidating the actual provisions of Roman law as set forth in the authorities. Their endeavour was to trace back the rules of law to general conceptions. This way of treating the subject-matter of law had not occurred to the Roman jurists. Throughout their writings they exhibit an astonishing skill in dealing with definite legal conceptions, but their skill was, to a very considerable extent, the skill of the artist who instinctively applies unalterable aesthetic laws without being intellectually conscious of them. The saying 'feeling is everything' is true more especially of art, including the particular art in which the Roman jurists were pre-eminent above all others, the art namely of developing a legal system through the casuistic method, by a clear-sighted adjustment of conflicting principles (supra, p. 102). Modern jurisprudence is quite different in character. It is reflective, it is, so to speak, 'sicklied o'er with the pale cast' of general conceptions, though, on the other hand, it is just these general conceptions that constitute

its real power and enable it to exert a direct influence on practical life. Jurisprudence of this modern type, of which German jurisprudence offers a particularly instructive example, owes its origin to the scholastic science of the Commentators. The legal science of modern Germany is, to a considerable extent, an inheritance from the schoolmen of the Middle Ages.

The jurisprudence expounded by the Commentators in the fourteenth and fifteenth centuries has been described as a 'jurisprudence of abstract conceptions'. The description is appropriate enough, but it must not be taken to imply that the Commentators ever sacrificed the realities of life to the fetish of an abstract idea. For it was precisely by means of this 'jurisprudence of abstract conceptions' that the Commentators were able to build up a body of law which obtained *practical* force throughout the Western Continent.

It would not be difficult to show that the doctrines of the Commentators are already foreshadowed in the Gloss at every, or at least almost every, point. It is natural enough that this should have been the case, considering that the influence of scholasticism had been steadily in the ascendant ever since the early part of the twelfth century. In the main, however, the work of the Glossators was in its nature rather humanistic than scholastic. Their principal achievement was the revival of the spirit of antiquity, and Roman law remained, in their hands, to a large extent divorced from practical life. It was the Commentators who brought about a complete union between jurisprudence and life, and, at the same time, a union between jurisprudence and the scholasticism of the Middle Ages, for scholasticism was an integral part of mediaeval life. The Commentators transformed Roman law into a different law, viz. Mediaeval law, and they effected this transformation, not merely by fusing Roman law with the Canon law and German law in the manner we have previously described, but rather, first and foremost, by successfully applying the speculative methods of scholastic jurisprudence and thereby permeating the whole fabric of the law with the spirit of mediaeval scientific thought.

Written law always tends to fall short of the requirements of a growing national life: cases will occur for which the written text furnishes no direct decision. Roman law, even with the addition of the Glossators' explanations, formed no exception to

this rule. An unerring practical instinct had enabled the Roman jurists to supply the unavoidable gaps. The Commentators were the first to approach the problem by methods which were scientific in the fullest modern sense of the term. By analysing each rule of law as it came before them, they succeeded in evolving those general legal conceptions which, when ascertained, are found to dominate the whole field of law (supra, p. 33). Definitions and distinctions were the principal concern of the Commentators, but with all their scholastic cumbrousness it was precisely in the distinctions thus drawn between general conceptions that the abstract rules lying at the root of all law found expression for the first time.

Two examples may suffice to illustrate the nature and importance of the work of the Commentators. The question was discussed, how far a corporation (universitas) was competent to make binding rules. Bartolus was the first to point out that, in dealing with this question, a distinction must be made between a rule purporting to regulate the affairs of the civil community in general (statutum pertinens ad causarum decisionem) and a rule which only purports to regulate the internal affairs of the corporation (statutum pertinens ad administrationem rerum ipsius universitatis). Every corporation as such is competent to make rules of the latter kind, but rules of the former kind can only be made by such bodies as possess 'jurisdictio', that is, political authority. The principle thus insisted on by Bartolus is one of the utmost significance: it gives clear expression, for the first time, to the distinctive character of the political authority of the State, as contrasted with the authority of a mere corporation or society, and brings out at the same time the essential difference between the power to legislate and the mere power to manage one's internal affairs.[11] The far-reaching importance of the consequences involved in the principle thus laid down is sufficiently obvious.[12] Another of the questions discussed referred to what is known as the 'conflict of laws'. How

[11] Cp. Gierke, *Das deutsche Genossenschaftsrecht*, vol. iii. (1881) p. 387.

[12] Among such consequences we may mention the distinction between the power of the State to impose taxation and the power of a corporate body to levy rates or other payments within the limits of its authority. In this instance, again, it was Bartolus who drew the distinction in question (Gierke, p. 389). The whole subsequent development of the law was strongly influenced by the distinctions of Bartolus (Gierke, p. 456 ff.).

far does the validity of the municipal law of a State and of foreign law respectively extend? In other words, how far should a State give effect to foreign law? Here again Bartolus was the first to point out that the rules of law on this matter must be classified according to their contents, and that regard must be had more particularly to the question whether the rule under consideration is concerned 'circa rem' or 'circa personam' or with the 'sollemnitas actus'[13]—hence the subsequent doctrine of 'personal', 'real,' and 'mixed' statutes—and the distinction thus indicated by Bartolus retains to this day its fundamental importance for a large part of that system of International Private Law which is found alike among all the civilized nations of the West.

The effect of the labours of the Commentators was to import into Roman law (as fused with the Canon law) such a wealth of legal ideas as to render it, from an intellectual point of view, incontestably superior to any other contemporary system. The definitions and distinctions of the Commentators endowed the 'common law' with that great inward strength which enabled it to drive the rival statute-laws from the field and to assert itself in actual practice as a common law for Italy. The common law, rich in general conceptions, emerged victorious from the struggle with the particular laws, and its victory was a victory of ideas.

Now there is always some element of universal validity in ideas. The conception of (say) a corporation or a 'personal' statute must be equally true everywhere. Just as the scholasticism of the Middle Ages was a kind of philosophy, so the doctrines of the Commentators embodied a kind of philosophic jurisprudence. Their jurisprudence was in fact permeated by an idea which dates far back into antiquity, the idea, namely, of a Law of Nature; that is, an eternal, immutable law, equally valid at all times and all places, which can be deduced by an act of reason, by a purely intellectual process, from 'the nature of the thing itself'.[14] Down

[13] Cp. F. Meili, *Die theoretischen Abhandlungen von Bartolus u. Baldus über das internationale Privat- u. Strafrecht* (1894), especially pp. 17, 21, 22, 24, 29, 30 (Bartolus), and p. 45 (Baldus).

[14] The Middle Ages looked on the jus naturale as the divine law, the 'lex aeterna', the 'ipsa ratio gubernationis rerum in Deo sicut in principe universitatis existens', so that all positive law was necessarily dominated by it and had to be derived from it: 'omnis lex e lege aeterna derivatur' (St. Thomas Aquinas). Cp. Gierke, *op. cit.* p. 610; Hinschius, *Kirchenrecht*, vol. iii. (1883) p. 730; Bergbohm, *Jurisprudenz und Rechtsphilosophie*, vol. i.

to the beginning of the nineteenth century and the advent of Savigny the science of law was entirely dominated by the philosophic point of view represented by the advocates of the law of nature. And in truth the doctrine of the law of nature contains an indestructible element. The human mind is continually urged, as by an instinctive impulse, to get beyond the necessarily imperfect law of the present and to reach out to an ideal type of perfect law. It is hardly surprising, therefore, that the theory of the law of nature should have taken the world by storm, when it presented itself for the first time fortified with all the authority that the jurisprudence of the Commentators could confer upon it.

While in the Eastern Empire Roman law was degenerating into a mere provincial law for the Greeks and, as such, was maintaining but a precarious existence, in the West it was gathering force for a fresh period of power. In the main it was the labours of the Commentators that had fitted Roman law for its new career. By working out their scientific conceptions in immediate connexion with the doctrines of Roman law, they were able to present Roman law (in the shape which it assumed under their hands) in the light of a natural law founded on scientific principles, a law, therefore, which claimed to be recognized as a common law valid not only for Italy, but for all countries. In a word, the Commentators raised Roman law for the second time in history to the rank of a universal law. The path was now clear for the reception of Roman law in Germany.

§ 28. *The Law of the Pandects in Germany.*

Among the Commentators the most important and influential was Bartolus. Next to him we may rank his pupil Baldus. In almost every department the writings of Bartolus mark a decisive stage in the evolution of legal conceptions. The central figure in the general legal history of the Middle Ages is neither Irnerius nor any one of the Glossators, but Bartolus. His commentaries dominated the practice of the courts. In Spain and Portugal, where they were also received, they actually enjoyed statutory

(1892) p. 157.—Ulpian in l. 1 §§ 3. 4 D. de just. (1, 1). Gajus, l. 9 eod.—Raimundus Lullus, one of the precursors of the Commentators, sought 'jus positivum ad jus naturale reducere' (Savigny, *Geschichte*, vol. v. p. 642).

authority.[1] The creation of the common law of Italy was due first and foremost to the labours of Bartolus. He is entitled, therefore, to be regarded, more than any one else, as the creator of the common law of Germany which sprang from the 'reception'. In France, indeed, a reaction set in during the sixteenth century against the jurisprudence of Bartolus: the French school of historical jurisprudence, which rose into prominence at that time, and whose most distinguished representatives were Cujacius and Donellus, abandoned scholasticism in favour of pure Roman law, and by devoting its attention rather to antiquarian research and philological learning than to practical life it paved the way for a revival of the original spirit of the Roman jurists in the scientific study of jurisprudence. The movement thus initiated by the French jurists was succeeded in the seventeenth and eighteenth centuries by the growth of a Dutch school of jurists who, like their French predecessors, were more interested in the 'elegancies' of theory than the working of practical law. Among the representatives of this school we may name Voet and Bynkershoek. In Germany, on the other hand, the Italian jurists remained supreme. In the commencement of the sixteenth century, it is true, the humanistic and antiquarian school of thought found a German representative in Ulrich Zasius, who, however, remained without followers. Accordingly it was not the Corpus juris itself that was received in Germany as a code in actual force; in reality it was the commentaries of Bartolus and, in a secondary degree, those of Baldus that were received as the common law of Germany.

Roman law, then, was not received in Germany in its pure form, but in the modified form which it had assumed in the hands of the Glossators and Commentators. The Canon law and the feudal law of the Lombards (the 'libri feodorum', p. 138) were received simultaneously with Roman law, and, like Roman law, they were received in the shape which the Italian jurists had given them. As in Italy, so in Germany, the unglossed parts of the Corpus juris were not admitted.[2] The Roman law thus adopted was further modified and supplemented in the course of a development which

[1] Cp. Savigny, *Geschichte*, vol. vi. p. 154.

[2] This led to the development of the rule which we find recognized from the close of the seventeenth century onwards: 'Quidquid non agnoscit glossa nec agnoscit curia.' Cp. Landsberg, *Ueber die Entstehung der Regel: Quidquid non agnoscit glossa* (1880).

took place within Germany itself. As received, the common private law of Germany was in truth Italianized Pandect law; it was now gradually converted into a modernized, Germanized Pandect law.[3] It was strong more particularly on the scientific side, and down to the second half of the seventeenth century the study of jurisprudence in Germany was—as far, at any rate, as private law was concerned—practically identical with the study of the Pandects.

The promulgation, in the year 1495, of the Ordinance regulating the administration of justice in the newly constituted Court of the Imperial Chamber (Reichskammergericht) was an event of decisive importance for the reception of foreign law—that is, of Roman, Canon, and Lombard law—in Germany. By this Ordinance the Court was instructed to 'adjudicate in accordance with the common law of the Empire, and likewise in accordance with such ordinances, statutes, and customs of the principalities, seignories, and courts *as are brought before it* and are equitable, proper, and tolerable'. That is to say, the Court was to decide, on principle, according to the 'common law of the Empire', i. e. Roman law (in the shape which it had by this time received at the hands of the Commentators), and only in exceptional cases according to German law. Such was held to be the meaning of the highly significant words, 'as are brought before it.' The Court was not to take any account of local—i. e. German—'ordinances, statutes, and customs', unless they were 'brought before it', unless, that is, their existence was proved by evidence. A claim founded on Roman law had—in the language of the later times—'fundatam intentionem'; in other words, the validity of Roman law did not require to be proved; it was taken for granted and was legally presumed. Roman law had been received in its entirety, 'in complexu,' as the later lawyers phrased it—this is clearly implied in the words above cited from the Ordinance of 1495—it was in force as a whole and in every part, except so far as the contrary could be proved. On the other hand, if a litigant appealed to German law, he had the onus of proving that the rule he relied on was actually in existence, that is, he had to satisfy the Court affirmatively that such a rule was really in force at the particular place in question. The Assessors

[3] Hence the term 'Usus modernus Pandectarum' (or 'Usus modernus', simply) as applied to the common private law of Germany from the second half of the seventeenth century onwards.

of the Reichskammergericht were not bound to know German law by virtue of their office. They had judicial knowledge only of foreign law. How then was German law to be proved? So far as the local laws consisted of 'ordinances' or 'statutes', the proof may have been easy enough. But the great bulk of German law consisted of 'customs', and the existence of customary law had to be proved by evidence. Such was the doctrine universally accepted in former times; it was indeed the doctrine enunciated in the passage already quoted from the Ordinance of 1495. In effect it meant simply that in Germany itself the existence of German law required to be legally proved. It is obvious that the proof of local customary laws must have been beset with the utmost difficulties. The rule casting the onus of proof on German law placed the indigenous law at such an enormous disadvantage as to endanger its very existence. But even where the difficulties of proving the existence of local law were successfully overcome it did not by any means follow that the Court would give effect to it. A further question then arose as to whether the law thus proved were 'equitable, proper, and tolerable'. And there can be no doubt that, frequently enough, the lawyers of that age—men trained in Roman law—showed a disposition to regard German law as 'intolerable' law,—a disposition which is not unknown even among jurists of our own times. The German lawyers took precisely the same view of the local laws as the Italian lawyers had once taken of the city-statutes (supra, p. 142). To them Roman law was the only rational law, a law based on the nature of things, and German law was irrational law.

Thus it happened that, as a rule, only those portions of the German local laws survived which were directly covered by the clear and explicit words of some statute. German law had to face the hostility both of the scientific jurists and of those charged with the administration of the law. All the forces of science were ranged on the side of Roman law, and Roman law had exclusive command of the influence which belongs to ideas and legal principles, an influence which—unconsciously perhaps—dominates the practical administration of justice. The local laws of Germany were treated in exactly the same way as the statute-laws of Italy; that is to say, they were interpreted and applied in accordance with the principles of the common law. The result was that, like

the statute-laws of Italy, they became 'sterilized' (supra, p. 143, n. 7). The local laws only held their own where protected by the plain letter of some statute. Everywhere else the common law stepped in. The 'particular' German laws, the laws of localities and territories, were originally conceived as complete in themselves. It was only when their spirit had been killed by the process we are now describing that they came to be regarded as defective. The reception of foreign law was effected by the destruction of German law. This destruction was due in the main to the scientific jurists and to the powerful influence of the doctrine of the law of nature, which pervaded, not the new jurisprudence alone, but the entire intellectual revival of the age.

The period of the reception covers the sixteenth and seventeenth centuries. During this time the foreign law was, so to speak, on the offensive. It showed its power by transforming the German courts of law. As early as 1495 half the judges, and afterwards all the judges, of the Court of the Imperial Chamber were trained civilians. The example of the Reichskammergericht was followed in the sixteenth century by the courts of the German Princes in the several German territories and (partly during the sixteenth, partly as late as the seventeenth century) Roman law captured even the lowest courts in Germany, invariably sweeping away the ancient and popularly constituted courts (Schöffengerichte) and replacing them by trained officials called 'Amtmänner'.[4] Every additional change in the constitution of the German courts meant a fresh blow to the struggling indigenous law. For the men who now officiated as judges had studied no law but foreign law.

This state of affairs continued right down to the close of the seventeenth century, about which time a new movement commenced. A change came over the attitude of the scientific jurists. They began to consider the law of nature in a new light, and to appeal to it in support of the view that the present is entitled to think for itself, and, if necessary, to disregard the older claims of tradition. It was under the guiding influence of this new point of view that the territorial laws of Germany grew steadily in importance during the eighteenth and nineteenth centuries, and a strong reaction set in against the authority of the common Roman law. The State

[4] Cp. A. Stölzel, *Die Entwickelung des gelehrten Richtertums in deutschen Territorien*, 2 voll., 1872.

legislatures began to play a more active part in the shaping of the law, their aim being to clear away whatever appeared antiquated. Among the laws thus condemned as antiquated was the law of the Pandects. New legal rules, it was urged, were demanded by the new requirements. The law of the present sought to shake itself free from the trammels of the past. The effect of the new doctrine of the law of nature showed itself in the numerous codifications of the period, a vigorous beginning being made in this direction as early as the eighteenth century (supra, pp. 5, 6). The age of 'received' foreign law was thus gradually coming to a close.

Simultaneously with the movement here described—that is, from the commencement of the eighteenth century onwards—'German Private Law' took its place, side by side with the Pandect law, as a distinct branch of legal study (supra, p. 4). The jurists began to realize the intellectual value of the local laws of Germany which had survived the reception. Thus the general legal conceptions derived from the Pandect law were confronted with a rival set of conceptions, no less carefully elaborated, but drawn from indigenous sources.

It was at this juncture, when the law of the Pandects was threatened on all sides by powerful foes, that Savigny appeared on the scene. Savigny succeeded in rehabilitating the scientific study of the Pandects,[5] but his very success proved fatal to the further existence of the Pandect law as the positive common law of Germany. The appearance of Savigny was an incident of the great 'romantic' movement which, in the beginning of the last century, drove the philosophy of 'enlightenment' from the field and substituted in its place a tendency to regard the present as determined, in the main, by given matters of fact, by what is positive, historical, inexplicable (and in that sense romantic).

Savigny was the founder of the so-called historical school of law. According to his teaching, law must be regarded as a product of the entire history of a people; it is not, he contends, a thing that can be *made* at will, or ever has been so made; it is an organic growth, which comes into being by virtue of an inward necessity and continues to develop in the same way from within by the operation of natural

[5] Special mention should be made of Hugo as a precursor of Savigny; see Joh. Merkel, *Gustav Hugo* (Festrede; Göttingen, 1900).

forces.[6] While therefore the doctrine of the law of nature had given a powerful impetus to the legislative efforts of the period, Savigny's teaching was—to say the very least—calculated to raise serious doubts as to whether there was any 'call for legislation' in our age at all. Savigny was keenly alive to the defects inherent in all statute-law, and gave trenchant expression to his views. Nevertheless he himself became afterwards—in 1842—the Chief of the Prussian Legislative Department. The 'call for legislation' has its source, not in our faculties, but in the practical necessities of popular life.

Savigny exercised an immense influence in the field both of theory and of practice, in the latter more particularly through his classical work on Possession.[7] This book contained the first systematic account of the Roman doctrine of possession which was 'based directly on the authorities', that is, on the Corpus juris. The common law doctrine of possession which had hitherto prevailed in Germany, the doctrine of the Usus modernus, was totally different from the Roman doctrine. The effect of the Canon law—the 'actio spolii'—on the one hand, and of the theory and practice of the Common Law, on the other, had been to create a divergence between the two doctrines which extended even to fundamentals. Savigny's treatise brought the claims of the pure Roman doctrine prominently before the legal public: it was a masterly exposition bearing splendid testimony both to the author's genius and to the wonderful power of Roman jurisprudence. Never before had Roman law been painted in such brilliant colours. The effect of the book was extraordinary. Its conclusions were immediately accepted on all hands. The traditional doctrine of possession, as contained in the Usus modernus, offered little resistance and was discarded almost without a struggle. German jurisprudence experienced a complete revolution. Casting the Usus modernus on one side, the jurists applied themselves with ardour to the pure Roman law of the Corpus juris. The noble symmetry of the classical law attracted the enthusiastic admiration of all students. A number of jurists of quite exceptional ability succeeded in giving a complete and vivid picture of Roman law as it originally existed. A perfect cataclysm

[6] Savigny, *Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*, 1st ed., 1814.

[7] Savigny, *Das Recht des Besitzes*, 1st ed., 1803.

overtook the Usus modernus: nothing survived of it except what was based on the bedrock of ancient classical authority. The culminating point in this development is marked by Savigny's 'System of Modern Roman Law', followed by Puchta's classic treatise on the Pandects. A reaction subsequently set in, first in favour of the Usus modernus—see, for example, Bruns' 'Recht des Besitzes' (1848)—and in more recent times in favour of modern legal requirements and legal ideas (Jhering, Windscheid, Bekker, Dernburg). But what Savigny and his historical school had destroyed could not be restored, or at any rate could only be imperfectly restored. The Usus modernus—in other words, the law of the Pandects as altered in accordance with the legal habits and ideas first of Italy and then of Germany—was finally superseded. Its place was taken by a Pandect law which, apart from a few modifications, was pure Roman law. In the field of legal theory the successes achieved by the German writers on the Pandects were indeed brilliant beyond all expectation, but the return to the original sources of Roman law rendered it impossible for the law of the Pandects to retain its vitality in practical life. As an effective instrument of legal education, this new 'law of the Pandects' was and will always remain unsurpassed, but it was not to be expected that a law so intimately associated with the past life of ancient Rome should continue for any length of time to dominate the life of modern Germany as an actual positive law. The law of the Pandects had played a great part in its time. Its rôle was now exhausted, and it had to make way for the law of the German Civil Code.

Such is the position of affairs at the present time. The Corpus juris civilis has now ceased to have any force as an actual code of law, but it will continue to hold its own as a subject of scientific study. As a piece of legislation the system of Roman private law was destined to pass away; as a work of art it will endure for all time.

PART II

THE SYSTEM OF ROMAN PRIVATE LAW

§ 29. *The System of Private Law.*

PRIVATE law is concerned with rights which are intended, by their very nature, to serve the self-interest of the individual; in other words, it is concerned with rights which assign to the person entitled a sphere of unfettered action, an arbitrary power to do as he chooses (supra, pp. 24, 25). Private law, in this sense, has its ultimate origin in the law of the family, in the rules, namely, which obtained in early times within the separate 'familiae' or households. In modern systems the law of the family, so far as it regulates the personal relations of power between the members of a family (viz. the marital, parental, and tutorial power), lies on the very border-land of private law. For nowadays the rights of control which spring from the law of the family have ceased to have exclusive reference to the interests of the person entitled to them, though they still retain a certain element of arbitrariness. In modern systems the central position in private law is occupied by the rules concerning the dominion of persons over things, or the equivalents of things,—in a word, by the Law of Property. Thus private law may be defined, with reference to what we now conceive to be its primary object, as the sum of binding rules which distribute among the individual members of a community, in their own interests, a certain power over the outside world and thereby regulate the economic conditions of such community. The pith of private law lies in the law of property. In other words, private law consists first and foremost of the rules regulating ownership and other rights of property. Coupled with these rules and intimately connected with them, we have the rules regulating family relations.

It is the business of a systematic exposition of private law to unfold and exhibit the essential character of private law as we have just described it.

The exposition of private law opens with the Law of Persons,

that is, with the legal rules by which the range of the possible subjects of private rights is determined. Accordingly the law of persons has to deal with the question as to who is capable of having private rights. As a department of private law, it is identical with the law of the *subject* of private rights, in other words, it is concerned with proprietary capacity, the capacity of holding property.

On the other hand, in private law the thing is always the object of a legal right. But it may be subjected to the will of the person invested with the right in one of two ways: either directly, the right existing over the thing itself (real rights);* or indirectly, i. e. through the medium of the act of another, the debtor (obligatory rights).* The purpose of real rights (such as ownership) is to enlarge, at once and definitively, the scope within which the person entitled may exercise his power. Real rights are thus the *final end* of proprietary dealings. On the other hand, the purpose of obligatory rights is to make over to the creditor, by means of the act of the debtor, at some future time, a thing or that which has the value of a thing. Obligatory rights are thus the *means* of proprietary dealings. In accordance with this difference in the nature of proprietary rights the Law of Property is divided into the Law of Things (which is concerned with real rights) and the Law of Obligations (which is concerned with obligatory rights).

Within the sphere of private law, however, proprietary rights do not always appear separately. A person's property is affected *in its entirety* both by the position he occupies in his family, and by its devolution on his death. Not only does the family affect the property of the individual during his life, but to the family is due the fact that, even after his death, his property continues to exist as a living whole (infra, § 108). The rules on these subjects are comprised in the Law of the Family and the Law of Inheritance respectively. Family Law is concerned with the effects which the position of an individual in his family produces on his property. The Law of Inheritance is concerned with the effect of death on the property of the deceased. With the rules relating to legal effects of family relations upon property ('Applied Family Law') are con-

* *Translator's Note.* The term 'real rights' will be used throughout in the sense as here defined, i. e. in the distinctive sense of the German term 'Sachenrechte'. As to the term 'obligatory rights', see infra, Translator's note to § 60.

nected the rules on the family relations themselves ('Pure Family Law'): it is here we find the point of contact between the rules of private law regulating the family and the rules of private law regulating property.

The system of Private law thus consists of three great departments:

1. the Law of Persons, being the law of proprietary capacity;

2. the Law of Things and Obligations, being the law of property with reference to its constituent parts;

3. the Law of Family and Inheritance, being the law of property viewed in the aggregate,—this department being closely bound up with the existence and organization of the family.

The law of property in reference to its constituent parts, i. e. the law of things and obligations, which is usually called the law of property simply (in the narrower sense of the term), should be preceded by a general part, dealing with those principles which are equally applicable to all proprietary rights. Thus we have the following arrangement:

I. The Law of Persons, or the law of the subject of property.

II. The Law of Property, or the law of the constituent parts of property.

1. General part.

2. The Law of Things.

3. The Law of Obligations.

III. The Law of Family and Inheritance, or the law of the aggregate of property.

1. The Law of the Family.

2. The Law of Inheritance.

Running through all the details of exposition, we shall find this one fundamental idea, that private law is the law of property, but that the law of property is, to this day, inextricably bound up with the law of the family.

BOOK I

THE LAW OF PERSONS

§ 30. *The Conception of a Person and the Kinds thereof.*

To be a person, within the meaning of private law, is to be capable of holding property, of having claims and liabilities. A person, then, in the sense of private law, is a subject endowed with proprietary capacity.

We distinguish, in the sense of private law, two kinds of persons: first, natural, and secondly, juristic persons. A 'natural person' is a human being with proprietary capacity. A 'juristic person' is a subject other than a human being which is invested with proprietary capacity (e. g. the State, a municipality).

This distinction between two kinds of persons means practically a distinction between two kinds of property.

The property of a 'natural' person—that is, of a single human being—serves the purposes of that person; it is the exclusive property of a single individual; in a word, it is private property, in the fullest sense of the term; it exists for this particular person alone, and for no one else; it is withdrawn from all other persons. It is against property of this kind—private property, or the property of 'natural' persons—that the attacks on property are directed, such attacks, for example, as find expression in the cry, 'la propriété c'est le vol.' But it is the greatest of fallacies to imagine that there is any real conflict between private property and the common interests of all. The effect of private property is, no doubt, to withdraw something from the common store: but what private property takes away it gives back an hundredfold. Private property is the foundation upon which every free, self-contained individuality is built up. To realize such an individuality in oneself is the aim of every human being; to bring forth individualities is the destination of the history of mankind. Every nation depends

on its free men for the supply of that force which advances and uplifts the national life, carrying the whole community along with it. Private property helps to create the atmosphere in which liberty thrives, and without liberty it is impossible for the individual members of a community to put forth to the full their moral, intellectual, and material powers, and impossible, consequently, for the community as a whole to bring its development to a triumphant issue. Private property does not exist solely in the interests of the individual; it is the strong rock upon which the life and the welfare of the whole nation are firmly founded.

With regard to the property of a juristic person, on the other hand, if we look at it in its practical bearings, we shall see that, from its very inception, it never exhibited that individualistic feature which is so characteristic of the property of single persons. The juristic person—be it the State, a community, a university, or any other—represents a particular form which *society* assumes in order to claim its share of property for the purposes of the common good. In its practical results, the property of a juristic person is social property. And being social property its benefits accrue—as a rule, at any rate—to all, either directly or indirectly; as far as its material effects are concerned, it is *not* private property, not, at least, in the sense in which the property of a natural person is private property. In its essential nature, the property of juristic persons is *public* property, as opposed to the property of natural persons, which is private property in the strict sense of the term.

It is not right that individuals should appropriate all this world's goods to their own exclusive use. Inequality in the distribution of economic wealth is an unavoidable incident of any system of private property—though it does not follow that the inequality is incapable of adjustment—and dark indeed are the shadows which private property has consequently cast on the lives of the people. But the evils in question can be mitigated, and one way of mitigating them is to make a certain proportion of the national property *social* property by vesting its ownership inalienably in the community as a whole, in the entire body of its members. What this proportion should be is the question on which the long struggle of history turns. It is accordingly with a view to

softening the evils of private property that juristic persons are opposed to natural persons. Society revolts against the tyranny of the individual. The principle of individualism requires to be constantly supplemented by the principle of socialism, and in the same way private property has to be supplemented by public property. Natural persons alone cannot satisfy the needs of human society: it is in juristic persons that they find their necessary complement.

CHAPTER I

NATURAL PERSONS

§ 31. *Introduction.*

THE law regards a human being as a person—that is, as a subject capable of legal rights—from the moment of completed birth only. The maxim 'nasciturus pro jam nato habetur, quoties de commodo ejus agitur,' merely means that the capacity of a natus to have rights is, in certain circumstances, dated back to a moment preceding his actual birth and is determined by reference to a time when he was still *en ventre sa mere* (nasciturus). This rule is particularly important for the law of inheritance. The estate of a deceased person can only vest in some one in being at the time when it devolves; but it is not necessary that he should be actually born, it is enough if, at the time in question, he has been conceived. In other words, a succession cannot devolve on a nasciturus *as such*, but only on a natus, though it may happen that, at the moment when the death occurred, the natus was in fact only a nasciturus. Accordingly the estate of a father will devolve on his child, even though the child is only born after the father's death.

L. 7 D. de statu hom. (1, 5) (PAULUS): Qui in utero est, perinde ac si in rebus humanis esset custoditur, quotiens de commodis ipsius partus quaeritur, quamquam alii, antequam nascatur, nequaquam prosit.

GERMAN CIVIL CODE, § 1: The capacity of a human being to have rights commences at the moment of completed birth. § 1923: No one can succeed to the estate of a deceased person unless he was alive at the time when such estate devolved. A person who at the time of devolution was not actually born, but was only *en ventre sa mere*, is deemed to have been born prior to the devolution.

The principle of modern law is that every human being is a person; that is to say, every human being as such is capable of legal rights, is, in a word, free; and as far as private law is concerned, one person's freedom—that is, his capacity of having

rights—is primâ facie as good as another's. But modern law has only reached this position after a long previous development. Roman law still occupies a much more primitive stage.

According to Roman law there are human beings who are not free (viz. slaves), human beings, that is, whom the law regards as *things* and who, for that reason, cannot be the subjects of rights of their own, but can only be the objects of rights of others. And even as between free men, Roman law recognizes different degrees of legal capacity which vary according to a person's civic rights and the position he occupies in his family. Among human beings the theory of Roman law accordingly distinguishes three kinds of 'status', or degrees of legal capacity: the status libertatis, according to which men are either free or slaves; the status civitatis, according to which freemen are either Roman citizens or aliens; the status familiae, according to which a Roman citizen is either a paterfamilias or a filiusfamilias.

L. 11 D. de cap. min. (4, 5) (PAULUS): Tria sunt quae habemus: libertatem, civitatem, familiam.

§ 32. *Slavery.*

Slavery destroys the dignity of man and places him, in the eye of the law, on a level with the beasts. A slave, therefore, is a human being who is, legally, not a person, but a thing. He is exposed to the arbitrary power of his master. His master owns him, has dominium over him, in other words, has power over the body of the slave. But a slave is none the less the bearer of a natural personality, and was to some extent acknowledged as such by Roman law. Thus he is capable of concluding juristic acts, of managing, independently, certain property of his master's called 'peculium' (§ 88), and of committing delicts. According to the theory of the classical jurists, he may even incur a contractual obligation, though only a 'natural' one, i. e. the creditor cannot proceed against him by action (§ 84, *initio*).[1] Thus the slave has

[1] The master is liable to a noxal action for the delict of his slave (§ 86, 5), but if the slave is manumitted, he may be sued himself. The contract of a slave never renders the slave himself liable to an action, not even after he has been manumitted, but the master is liable, if the requirements of an actio adjecticia (§ 88) have been satisfied. Nevertheless, like other natural

a will which is allowed to produce certain legal effects in accordance with the principles of law just stated. In point of law, however, the will of the slave and, in fact, his mental faculties in general, operate, on principle, where they operate at all, for the benefit of his master. The master not only owns his slave as he owns a thing, but he has, besides, a power over his slave similar to that which he has over his son: the 'dominica potestas', a power not merely over the body, but over the will of his slave. Whatever a slave acquires, he acquires for his master.

Within the sphere of the jus sacrum a slave was, from the very outset, and within certain limits, acknowledged as a person. Thus he can validly bind himself to the gods by vow (votum) and oath; the grave of a slave is a 'locus religiosus' (p. 303), and slaves appear as members of religious associations.[2]

The rule remained, however, that, as against his master, a slave had no legal rights whatever. It was not till the Empire that a number of laws were passed, the effect of which was to afford slaves some kind of *legal* protection, the emperors, in the exercise of their jurisdiction, intervening to protect male slaves from inhuman ill-treatment and female slaves from prostitution (cp. supra, p. 108).

GAJ. Inst. I § 52: In potestate itaque sunt servi dominorum. Quae quidem potestas juris gentium est: nam apud omnes peraeque gentes animadvertere possumus, dominis in servos vitae necisque potestatem esse: et quodcumque per servum adquiritur, id domino adquiritur.

L. 1 § 8 D. de off. praef. urbi (1, 12) (ULPIAN.): Quod autem dictum est ut servos de dominis querentes praefectus audiat, sic accipiemus: . . . si saevitiam, si duritiam, si famem qua eos premant, si obscenitatem in qua eos compulerint vel compellant, apud praefectum urbi exponant. Hoc quoque officium praefecto urbi a d. Severo datum est ut mancipia tueantur, ne prostituantur.

GAJ. Inst. I § 53: . . . ex constitutione imperatoris Antonini qui sine causa servum suum occiderit, non minus teneri jubetur quam qui alienum servum occiderit. Sed et . . . praecepit ut, si intolerabilis videatur dominorum saevitia, cogantur servos suos vendere.

obligations, so the naturalis obligatio servi may be validly secured by sureties or discharged by payment, i. e. the surety may be sued on the guaranty, and money paid under the contract cannot be recovered,

[2] Cp. A. Pernice, *Sitzungsberichte der Berliner Akademie der Wiss.*, vol. li. (1886) p. 1173 ff.

Slavery may originate in the following ways:

(1) by birth, if the mother is a slave when the child is born (though if she were free for any period during gestation, however short, it is sufficient to make her issue free);

(2) by the fact of a free man becoming a prisoner among a hostile people;

(3) by condemnation on a criminal charge; for example, if a man is condemned to the mines or to be killed by wild beasts (servus poenae).

A slave becomes free by manumission, i. e. by a positive grant of liberty on the part of his master. The mere abandonment, or 'dereliction' of a slave, would not make him free and convert him into a 'person', but would only make him an ownerless slave, who would be treated as a res nullius and, as such, might become the property of anybody by 'occupatio' (cp. p. 317).

Early Roman law developed a variety of forms of manumission:

(1) Manumissio vindicta—the oldest form—is a form of manumission by means of in jure cessio (supra, p. 57). A third party, in the presence of the praetor, lays his rod (vindicta) on the slave and at the same time claims him as free (vindicatio in libertatem). Then the master, also laying his vindicta on the slave, declares his intention to enfranchise the slave, and the praetor, by his 'addictio', confirms the master's declaration.[3] Subsequently the forms of an action at law were dropped and all that remained was the declaration by the master, in court, of his intention to enfranchise his slave.

ULP. tit. 1 § 7: Vindicta manumittuntur apud magistratum populi Romani, velut consulem praetoremve vel proconsulem.

L. 8 D. de manum. vind. (40, 2) (ULPIAN.): Ego cum in villa cum praetore fuissem, passus eum apud eum manumitti, etsi lictoris praesentia non esset.

(2) Manumissio censu: the slave declares in person to the censor that he is a civis Romanus sui juris, and the censor, accepting this declaration, enters his name on the registers of citizens, and thereby makes him free.[4]

[3] Cp. Karlowa, *Röm. RG.*, vol. ii. p. 133; Wlassak, in Pauly's *Real-Encyklopädie der klassischen Altertumswissenschaft*, revised by Wissowa, 1892, *sub verbo* 'Addicere'.

[4] Cp. Degenkolb, *Die Befreiung durch Census* (in the *Tübinger Festgabe für Jhering*, 1892, p. 123 ff.). As a rule this transaction required the jussus

(3) Manumissio testamento, i. e. by means of a direct testamentary grant of liberty. The testator himself enfranchises the slave by his will at the moment when the latter becomes operative. The slave thus becomes free by virtue of a juristic act, viz. the will. He is accordingly the freedman of a deceased person, namely the testator, and is for that reason called 'libertus orcinus'. It is different if the bequest of liberty is indirect, i. e. if the master merely imposes on the heir, or on the legatee to whom he has bequeathed the slave, a trust to manumit the slave (fideicommissaria libertas). In such a case the slave does not become free by virtue of the will; in other words, he becomes free, not, as in the former case, ipso jure, at the moment when the will becomes operative, but only when the heir or legatee carries out the trust and performs the act of manumission (e.g. vindicta). The slave is then the freedman of a living person, namely the person on whom the trust was imposed, and has been manumitted, not testamento, but vindicta, or censu, or in ecclesia, or by some informal method, as the case may be.

ULP. tit. 2 § 7: Libertas et directo potest dari hoc modo: LIBER ESTO, LIBER SIT, LIBERUM ESSE JUBEO, et per fideicommissum, ut puta: ROGO, FIDEI COMMITTO HEREDIS MEI UT STICHUM SERVUM MANUMITTAT. § 8: Is qui directo liber esse jussus est, orcinus fit libertus; is autem cui per fideicommissum data est libertas, non testatoris, sed manumissoris fit libertus.

Constantine's legislation added a fourth mode, viz. manumissio in ecclesia: the master makes a declaration in the presence of the bishop and congregation of his desire to enfranchise the slave, and the slave is thereby manumitted.

Informal manumissions were void by the civil law. If, however, a slave had been informally manumitted, the praetor would protect him in the enjoyment of his freedom, and would, therefore, in such cases, refuse the master the vindicatio in servitutem. The praetor bestowed his protection in the same way on those whose manu-

domini, but the jussus did not, in point of form, constitute any part of the legal act itself. Formally speaking, the slave obtained his freedom by his own act, viz. by his 'professio' of citizenship which the censor accepted. As yet neither the manumissio censu nor the manumissio vindicta (which took the form of an action at law) was regarded as a mode of obtaining freedom by *juristic act*—a circumstance which is connected with the fact that 'originally the whole institution of manumission was unknown'. Degenkolb, p. 151. Cp. supra, p. 56, n. 6.

mission had, indeed, been properly carried out, but whose master was only a bonitary owner, i. e. a person whose ownership in the slave was only acknowledged by the jus honorarium (p. 311). The lex Junia Norbana[5] subsequently provided that all such freedmen as enjoyed their liberty tuitione praetoris should be legally free, but that their freedom should only be of the kind enjoyed by Latini coloniarii. Hence such freedmen were known as Latini Juniani (p. 175). Justinian, finally, having done away with the distinction between bonitary and quiritary ownership (p. 311), granted to freedmen who had been informally manumitted the same kind of freedom as that enjoyed by freedmen who had been formally manumitted, the freedom, namely, of a Roman citizen—provided only that the declaration by the master of his intention to enfranchise—whether made in writing (per epistulam) or by word of mouth (inter amicos)—was attested by five witnesses, or else that the slave had attended his master's funeral 'pileatus', i. e. wearing the pileus, or felt cap, which was the badge of the freeman.

L. un. § 1 C. de lat. lib. toll. (7, 6) (JUSTINIAN.): Sancimus itaque, si quis per epistulam servum suum in libertatem producere maluerit, licere ei hoc facere, quinque testibus adhibitis, qui post ejus litteras . . . suas litteras supponentes fidem perpetuam possint chartulae praebere. Et si hoc fecerit . . . libertas servo competat quasi ex imitatione codicilli delata, ita tamen ut et ipso patrono vivente et libertatem et civitatem habeat Romanam. § 2: Sed et si quis inter amicos libertatem dare suo servo maluerit, licebit ei, quinque similiter testibus adhibitis, suam explanare voluntatem: et . . . servi ad libertatem producantur Romanam quasi ex codicillis similiter libertatem adipiscentes. § 5: Sed et qui domini funus pileati antecedunt . . . si hoc ex voluntate fiat testatoris vel heredis, fiant ilico cives Romani.

A person who has been duly manumitted in accordance with the law—a 'libertus'—becomes a Roman citizen, without, however, obtaining the full rights of a citizen. He has indeed the suffrage, but he can only exercise it—during the Republic at least—in one of the four tribus urbanae (where he is thrown together with the whole mass of the city populace), and is thus debarred

[5] The year 19 A. D. is usually given as the date of this lex, but both its date and name (was it only called lex Junia ?) are doubtful. Cp. Mommsen in Bekker's u. Muther's *Jahrbücher d. gemeinen R.*, vol. ii. p. 348; Schneider, *ZS. d. Sav. St.*, vol. v. p. 225 ff., vol. vii. p. 31 ff.

from the more select tribus rusticae. Nor does he enjoy the jus honorum, or capacity for office, and he is disqualified from entering the senate, the council (curia) of a municipium, and the legion. The stigma of his unfree parentage still adheres to him. Thus, though in matters of private law he shares all the rights of a Roman citizen (jus commercii and jus connubii)[6], nevertheless he is denied full participation in matters of State.

Manumission is a kind of new birth. The master (patronus) therefore stands to his freedman in a relation analogous to the relation between father and son. The patron, as such, is entitled, as against his libertus, to a father's rights of succession and guardianship. He has the right of moderate chastisement (levis coercitio). He has the same claim to be treated with respect as he has against his son. He can claim to be supported by the libertus, if he falls into poverty. He is, lastly, entitled to certain services on the part of the freedman, which he can, if necessary, enforce by action, provided only the freedman had promised them after his manumission and in a manner not derogatory to his liberty.

On the death of the patron the jura patronatus devolve on his children. But the children of a libertus are ingenui.

A freedman can be declared an ingenuus, or freeborn man, by imperial decree. This proceeding is called 'natalium restitutio'. The effect of the gift of freedom is to extinguish all the other restrictions on his liberty together with the relation of patronatus. The bestowal by the emperor of the so-called jus aureorum anulorum—i. e. the right to wear a golden ring, the mark of equestrian rank (which under the Empire was worn by all freeborn persons)—also confers full freedom, but leaves the rights of the patron undisturbed. By a general enactment (Nov. 78, cap. 1. 2. 5), Justinian conferred on all freedmen the jus aureorum anulorum and the natalium restitutio, the latter, however, on condition that the patron waived his patronal rights. Under this new law of Justinian, then, every freedman, as such, enjoyed complete freedom. The public law of the Byzantine despotism, while it put an end to the free *citizen* of the old type, evolved, at the same time, another order in which

[6] The lex Julia and the lex Papia Poppaea, however, forbid intermarriages between senators (and their children) on the one hand, and freedmen on the other (infra, § 99).—The position of freedmen is discussed by Mommsen, *Röm. Staatsrecht*, vol. iii. p. 420 ff.

all members of the Empire ranked equally as *subjects* enjoying the same kind of freedom.

L. 7 § 2 D. de injur. (47, 10) (ULPIAN.): Etenim meminisse oportebit liberto adversus patronum non quidem semper, verum interdum injuriarum dari judicium, si atrox sit injuria quam passus sit, puta si servilis; ceterum levem cohercitionem utique patrono adversus libertum dabimus.

L. 1 § 5 D. quar. rer. act. (44, 5) (ULPIAN.): Quae onerandae libertatis causa stipulatus sum, a liberto exigere non possum; onerandae autem libertatis causa facta bellissime ita definiuntur, quae ita imponuntur ut, si patronum libertus offenderit, petantur ab eo, semperque sit metu exactionis ei subjectus, propter quem metum quodvis sustineat patrono praecipiente.

Already towards the close of the Republic the freedmen had begun to make themselves felt as a large class whose existence was not exactly conducive to the interests of the State. For the slaves that the masters got rid of by means of manumission were not always the best of their class, and, in any case, much foreign blood was being imported into the community of Roman citizens by the crowds of Greek, Syrian, Phoenician, Jewish, and African slaves. Hence certain measures were resorted to which aimed at restricting the practice of manumission. Thus in the year 4 A.D. the lex Aelia Sentia enacted, first, that such slaves as had been convicted of a crime should, on manumission, become, not Roman citizens, but only dediticii, i. e. homeless aliens (p. 174) who were forbidden to reside within Rome and were for ever debarred from acquiring the civitas. The same law enacted, secondly, that no manumission should have full validity, unless the master were at least twenty, and the slave at least thirty years old; failing which, a complete legal manumission could only be effected vindicta (in other words, with the co-operation of the magistrate) and only after the consilium, i. e. the legal advisers of the magistrate,[7] had satisfied themselves that there were special reasons why the manumission should be allowed. Thirdly, the lex Aelia Sentia enacted that all manumissions carried out by an insolvent debtor to the injury of his creditors (in fraudem creditorum)

[7] It was, in any case, the usual practice for the magistrate to take the advice of a consilium, and in regard to this particular case the lex Aelia Sentia made it compulsory on him to do so, at the same time laying down rules for the composition of the consilium: Romae quinque senatores et quinque equites Romani, in provinciis viginti reciperatores cives Romani (ULPIAN. tit. 1 § 13).

should be void. Another law, the lex Fufia Caninia, which fixed the maximum of testamentary manumissions within certain limits (ex tribus servis non plures quam duos, usque ad x dimidiam partem manumittere concessit, &c.), was repealed by Justinian (tit. I. 1, 7: de lege Fufia Caninia sublata).

NOTE.—*Relationships akin to Slavery.*

1. 'Statu liber' is one whom his master has manumitted by his will, subject however to a condition precedent or the lapse of a specified time. Till the condition happens or the appointed day arrives, he is, in the eye of the law, a slave. But a fulfilment of the condition or the arrival of the day converts him ipso jure into a free man, even though meanwhile he may have become the property of another man to whom the heir may have alienated or pledged him, or who may have acquired him by usucapio (seu alienetur ab herede seu usu capiatur ab aliquo libertatis condicionem secum trahit. ULPIAN. tit. 2 § 3).

2. 'Bona fide serviens' is the name given to a freeman who lives in the bona fide belief that he is the slave of his supposed master. As long as he remains in this condition, his juristic acts are governed by the same rules as those of slaves.

3. 'Esse in libertate' is a term applied to a slave who is in actual enjoyment of liberty. As long as he remains in this state, his acts are governed by the same rules as those of freemen.

4. 'Clientes' were, in the early law, unfree men who had risen to the position of vassals, or dependants, of a patrician gens. They were bound to certain payments and services, and also to private attendance on their master (patronus) in war. They were subject to the discipline and family power of the patron, and their sole protection lay in the fiduciary nature of the relations which subsisted between patron and client (vassal) and which operated within the jus sacrum. These clients subsequently developed into the Roman plebs (supra, p. 38 ff.).

5. 'Coloni' are the villeins of the later Empire. Though personally free, they are attached to the soil, glebae ascripti, i. e. they may not quit the land and are part and parcel of the estate. They bear a strong resemblance to the serfs of later times. Cp. l. 1 § 1 C. de colon. Thracensib. 11, 52 (THEODOS. II): Licet condicione videantur ingenui, servi tamen terrae ipsius cui nati sunt aestimentur nec recedendi quo velint aut permutandi loca habeant facultatem, sed possessor eorum jure utatur et patroni sollicitudine et domini potestate. During the first three centuries of the Empire the coloni were free tenants of their small holdings, but under the pressure of the interests of the great landowners, to whom the labour power of the coloni was an economic necessity, the relation between landlord and colonus was gradually converted into an hereditary one, and the coloni became tied to the soil—at first only *de facto* (in the course of the third century), but afterwards (in the fourth century) also *de jure*. See the literature on this subject cited above, p. 45, n. 3.

§ 33. *Cives and Peregrini.*

In our own times the importance of citizenship is confined to matters of public law, such as the franchise, the liability to taxation, &c. Private law has separated itself from public law, the principle of modern private law being that all men are legally equal. In ancient law, however, citizenship was, at the same time, a most decisive element in determining the extent of a person's private rights. In its older forms private law meant a law that applied exclusively to the citizens of a particular State: it was a civil law, in the literal sense of the word. Thus the specifically Roman law, which was known as the jus civile, was a law, not for everybody, but only for Roman citizens.

A civis is a Roman citizen, i. e. a man who, in the eye of Roman law, has full legal capacity in matters of public law (jus suffragii and jus honorum) and who alone has full legal capacity in matters of private law (jus commercii and jus connubii). His capacity is recognized, not merely by the jus gentium, but also by the jus civile. He can contract a Roman marriage, make a Roman will, own property ex jure Quiritium, &c. A peregrinus, on the other hand, is a person who, though not a citizen of Rome, is nevertheless (unless he be a dediticius) a citizen of another community. He is completely shut out from the public rights of a Roman citizen, and, in regard to private rights, his capacity is acknowledged by the jus gentium only,[1]—unless indeed he has been expressly granted the jus commercii and jus connubii by means, say, of an international treaty (pp. 66, 67). A peregrinus, as such, cannot therefore acquire true Roman ownership (dominium ex jure Quiritium), nor can he have the patria potestas or marital power (manus) or tutela (guardianship) of a Roman. He cannot acquire property by mancipatio; he cannot execute a Roman will; he cannot be made heir, legatee, or testamentary guardian under the will of a Roman citizen, nor can he even take part as a witness in any of these juristic acts of the Roman civil law. The jus commercii and jus connubii—in other words, full legal and commercial capacity in accordance with the

[1] In the oldest times a non-citizen was regarded as destitute of legal rights, an exception being made in favour of 'hostes' only, i. e. of citizens of a State allied to Rome by a treaty of friendship (hostis meant originally a 'guest'). Such absolute rightlessness, however, never existed except in theory. It was thus that, in consequence of the development described above (§ 13), the non-citizen, who at first had no rights at all, came to acquire his legal capacity under the jus gentium.

Roman jus civile (in the narrower sense of the word)—is, on principle, exclusively reserved for the Roman citizen.

It would, however, be a mistake to suppose that a peregrinus could not make a will or become a guardian at all, and that for him all those legal acts and legal effects had simply no existence. On the contrary, he is fully qualified to make a will or acquire ownership in accordance with the law of his own community. Thus, for instance, if he is an Athenian citizen, he may have the parental and marital power of Athenian law, he may make an Athenian will, and be appointed heir in the will of an Athenian citizen, and so forth. And just as an Athenian citizen is unable to make a Roman will and is shut out from the legal effects which such a will produces, so a Roman citizen is unable to make an Athenian will and is disqualified from acquiring any rights under such a will. This antithesis of mutually exclusive States and communities is a fundamental principle of ancient life. But it was a principle that could not be permanently maintained in the Roman Empire. An imperial polity was bound to lead to an imperial jus civile, and unity of the empire to unity of law. Hence the decisive importance of the step taken by the Emperor Caracalla when he conferred the Roman civitas on all such peregrini as were members of some political community (supra, p. 110). The only peregrini now left were the peregrini dediticii, i.e. aliens whose community had been destroyed and who had therefore no place that they could claim as their home and where they were entitled to reside.

Midway between the citizens and non-citizens stand the Latins. From the oldest times the Latin allies of Rome, i.e. the members of the town-communities of Latium, had had the same private law and marriage law as the Romans. It was, in fact, Latin private law and Latin marriage law, and Roman law was merely one particular manifestation of it. In their capacity, then, as allies of Rome who were governed by the same law, the Latins also enjoyed the jus commercii and jus connubii in Rome. But of course they did not, in early times, possess the public rights of a citizen (jus suffragii and jus honorum) in regard to the Roman community. The effect of the powerful interest, however, which soon came to attach to the public privileges of a Roman citizen was that (in consequence of the Social War) first the Latin allies and then all the Italian communities were granted the Roman civitas, including,

therefore, the public rights of a Roman citizen. Henceforward there are no more Latins in the old sense of the word, i.e. persons who are *born* Latins, but only, in the first place, Latin colonists, 'Latini coloniarii,' i.e. the free inhabitants of a colony founded with the jus Latii, or of a country upon which the jus Latii has been conferred (cp. supra, p. 110);[2] and, in the second place, Latin freedmen, 'Latini Juniani' (supra, p. 169). These two classes of Latins of the new and artificial type—persons who have been *made* Latins—only possess the jus commercii, and not the jus connubii, and the Latini Juniani are restricted even with regard to the commercium: they only have the commercium inter vivos, not the commercium mortis causa. A Latinus Junianus can neither make a will nor can he take anything under a will. When he dies, his property reverts to his master just as though he had remained all the time the slave of the latter.

The privilege conferred by Caracalla included the Latini coloniarii. From the very outset, the grant of the jus Latii was intended to prepare the Latin communities and districts for receiving the full Roman civitas. Thus after Caracalla the only Latins left are the Latini Juniani, who, not being members of any political community, were excluded from the grant of Roman citizenship.

It was Justinian's aim to sweep away the entire antithesis between jus civile and jus gentium. With a view to this purpose he formally abolished the Latina libertas of the Juniani and the peregrina libertas of the dediticii—conditions which had long lost all practical

[2] There are two forms of the jus Latii, the 'Latium minus', which is the older and the usual form, and the 'Latium majus', which probably only dates from Hadrian. In the communities which have the Latium minus, only the officials of the community acquire the Roman civitas; in the communities which have the Latium majus, it is extended to the decuriones, or members of the communal council. The object of introducing the majus Latium was to encourage applications for the office of decuriones, the heavy expenses and responsibilities connected with which had made it difficult—ever since the beginning of the second century—to obtain the requisite number of persons ready to act. GAJ. I. 96; O. Hirschfeld, *Zur Geschichte des latinischen Rechts* (Festschrift für d. archäolog. Institut in Rom, Vienna, 1879). Mommsen, *Latium majus*, in the *ZS. d. Sav. St.*, vol. xxiii. p. 46 ff.—On the other hand, the bestowal of the jus Italicum on a community of cives (a colony or a municipium) means that the community in question thereby acquires the privileges of a colonia Italica (i.e. an old colony of Roman citizens endowed with full legal rights), that its soil is therefore exempt from the land-tax and capable of quiritary ownership, in other words, is placed on the same footing as the fundus Italicus (cp. § 64, ii). Heisterbergk, *Name und Begriff des jus Italicum* (1885).

importance both in private and in public law; in the former, in consequence of the fusion of jus civile and jus gentium; in the latter, in consequence of the rise of absolutism and the annihilation of the political rights incident to citizenship. It must not however be supposed that Justinian adopted all at once the modern principle that, for purposes of private law, all men enjoy equal capacity. For according to the law of the Corpus juris foreigners—that is, persons who were not members of the Roman Empire—continued, as before, to be capable of such rights only as belonged to the jus gentium, and even a member of the Empire might, if he were sentenced for a crime, forfeit his civic rights and find himself restricted to rights conferred by the jus gentium.[3] But apart from the case of condemned criminals, the old legal distinctions disappeared as between subjects of the empire, and were finally displaced by those well-marked social distinctions of class by which the population had long been divided. On principle, every free subject of the Roman Empire was now ipso facto a Roman citizen. From a legal point of view, there remained, as between subjects of the Empire and apart from exceptional cases, but a single antithesis, viz. that between freemen and slaves. The principle of the distinction between citizens and non-citizens had vanished, as far as the subjects of the Empire were concerned. Local citizenship made way for imperial citizenship, as such. And, at the same time, this new imperial citizenship found its legal counterpart in an imperial law, uniform in all its parts. Corresponding to the universal citizenship of all within the Roman orbis terrarum, a universal law had been developed available for the world in general.

Ulp. tit. 19 § 5: Commercium est emendi vendendique invicem jus.

Ulp. tit. 5 § 3: Conubium est uxoris jure ducendae facultas.

Gaj. Inst. I § 14: Vocantur autem peregrini dediticii hi qui quondam adversus populum Romanum armis susceptis pugnaverunt, deinde victi se dediderunt.

Gaj. eod. § 28: Non tamen illis (i.e. the Latini Juniani) permittit lex Junia vel ipsis testamentum facere, vel ex testamento alieno capere, vel tutores testamento dari.

Gaj. eod. III § 56: . . . admonendi sumus . . . eos qui nunc Latini Juniani dicuntur olim ex jure Quiritium servos fuisse, sed

[3] L. 17 § 1 D. de poenis (48, 19).—Cp. on the above topic Leonhard, *Institutionen des röm. Rechts* (1894), p. 189, and infra, p. 180.

auxilio praetoris in libertatis forma servari solitos; unde etiam res eorum peculii jure ad patronos pertinere solita est; postea vero per legem Juniam eos omnes quos praetor in libertate tuebatur liberos esse coepisse et appellatos esse Latinos Junianos; Latinos ideo, quia lex eos liberos perinde esse voluit atque si essent cives Romani ingenui qui ex urbe Roma in Latinas colonias deducti Latini coloniarii esse coeperunt.—Legis itaque Juniae lator ... necessarium existimavit, ne beneficium istis datum in injuriam patronorum converteretur, cavere ut bona eorum proinde ad manumissores pertinerent ac si lex lata non esset: itaque jure quodammodo peculii ad manumissores ea lege pertinent.

§ 34. *Paterfamilias and Filiusfamilias.*

Every Roman citizen is either a paterfamilias or a filiusfamilias, according as he is free from paternal power (homo sui juris) or not (homo alieni juris). Paterfamilias is the generic name for a homo sui juris, whether child or adult, married or unmarried. Filiusfamilias is the generic name for a homo alieni juris, whether son or daughter, grandson or granddaughter, and so on.

As regards public law the distinction between paterfamilias and filiusfamilias is of no importance. A filiusfamilias, provided he has all other necessary qualifications, is as much entitled to vote in the comitia and to be elected consul as a paterfamilias.

The effect of the distinction is confined to private law. True, the filiusfamilias is entitled to the jus commercii and jus connubii as much as the paterfamilias, for he is as much a Roman citizen as the paterfamilias. By the civil law, therefore, the son can make contracts, acquire ownership,[1] be instituted testamentary heir, contract a valid marriage, &c. But whatever a filiusfamilias acquires he acquires for the paterfamilias. Whatever rights he acquires, be they rights of ownership or obligatory rights, nay, even the marital power over his own wife and the paternal power over his own children, vest not in him, but in his father. For according to early Roman law there exists in every Roman household but one ownership, one marital and one paternal power: that of the paterfamilias. It is only the debts of a filiusfamilias which accrue, not to his father, but to himself. In other words, a filiusfamilias has passive, but no active proprietary capacity.

[1] Thus, he may use mancipatio, but not in jure cessio, because it was part of the procedure of in jure cessio (supra, p. 57) that the party should claim *ownership* 'in jure'. But according to the old law a filiusfamilias, being a homo alieni juris, is incapable of holding ownership (v. infra).

But during the Empire the filiusfamilias gradually acquired an active proprietary capacity. Soldiers were the first to obtain it. Whatever a filiusfamilias miles acquired as a soldier (bona castrensia), he acquired for himself, and not for his father. Public officials were the next to obtain the same privilege. Whatever a filiusfamilias earned in the civil service, or as an advocate, or acquired by gift from the emperor (bona quasi castrensia), belonged to himself and not to his father. The capacity to acquire property was ultimately extended to every filiusfamilias. Whatever a filiusfamilias acquires, not from his father, but from his mother or some stranger (bona adventicia), belongs to himself as owner; all that the father is entitled to in respect of such property is a right of management and a usufruct. Thus, according to the law in Justinian's time, the only person from whom the filiusfamilias is unable to acquire anything is his father. Whatever a filiusfamilias receives from his father remains in the ownership of his father, even though the latter may allow him to dispose of the property (peculium profecticium). Cp. infra, § 101.

L. 195 § 2 D. de V. S. (50, 16) (Ulpian.): Pater autem familias appellatur qui in domo dominium habet; recteque hoc nomine appellatur, quamvis filium non habeat: non enim solam personam ejus, sed et jus demonstramus. Denique et pupillum patremfamilias appellamus, et cum paterfamilias moritur, quotquot capita ei subjecta fuerint, singulas familias incipiunt habere; singuli enim patrumfamiliarum nomen subeunt. Idemque eveniet et in eo qui emancipatus est: nam et hic sui juris effectus propriam familiam habet.

Gaj. Inst. II § 87: Igitur, quod liberi nostri quos in potestate habemus . . . mancipio accipiunt vel ex traditione nanciscuntur, sive quid stipulentur vel ex aliqualibet causa adquirunt, id nobis adquiritur: ipse enim qui in potestate nostra est nihil suum habere potest.

§ 35. *Capitis Deminutio.*

Capitis deminutio is the destruction of the 'caput' or legal personality. Capitis deminutio, so to speak, wipes out the former individual and puts a new one in his place, and between the old and the new individual there is, legally speaking, nothing in common. A juristic personality may be thus destroyed in one of three ways:

(1) by loss of the status libertatis. This is the capitis deminutio maxima;

(2) by loss of the status civitatis. This is the capitis deminutio media (magna);

(3) by severance from the agnatic family. This entails capitis deminutio minima.

Capitis deminutio maxima means the loss of a man's *entire* juristic personality. Capitis deminutio media and minima merely mean the loss of the particular juristic personality which a man has hitherto possessed.

To undergo capitis deminutio maxima is to forfeit one's liberty. A Roman civis may, like others, become a slave, e.g. if he is condemned for a crime, or if he falls in potestatem hostium, that is, if he passes into the captivity of a hostile people. If, however, a Roman citizen returns from his captivity, he becomes, at the moment of his return, a Roman citizen again and enjoys once more all the rights he had lost by his capitis deminutio in just the same manner as though he had never in fact lost them. He resumes his position as the paterfamilias of his children, the owner of his property, the creditor of his debtors, and so on. In short, he becomes the subject of all the legal relations which his captivity had extinguished for him to the same extent as though he had never been a prisoner at all. It is this that constitutes the so-called jus postliminii. Let us suppose, however, that the Roman civis in question does not return, but dies in captivity. At the time of his death he is clearly not a civis Romanus, but a slave. Is then the will which he executed at home, before he was taken prisoner, void or not? And, to go a step further, since a slave cannot have any heirs, can he (the prisoner) have heirs or not? All these difficulties were solved by the so-called fictio legis Corneliae (one of Sulla's laws), according to which a Roman civis, dying in captivity, was assumed never to have been actually taken prisoner at all, but to have died at the very moment of being so taken.

§ 5 I. quib. mod. jus pot. solv. (1, 12): Postliminium fingit eum qui captus est semper in civitate fuisse.

L. 16 D. de captiv. (49, 15) (Ulpian.): Retro creditur in civitate fuisse qui ab hostibus advenit.

L. 12 D. qui test. fac. (28, 1) (Julian.): Lege Cornelia testamenta eorum qui in hostium potestate decesserint, perinde confirmantur ac si hi qui ea fecissent in hostium postestatem non pervenissent; et hereditas ex his eodem modo ad unumquemque pertinet.

L. 18 D. de captiv. (49, 15) (Ulpian.): In omnibus partibus

juris is qui reversus non est ab hostibus quasi tunc decessisse videtur, cum captus est.

Capitis deminutio media (or magna) is loss of citizenship unaccompanied by loss of liberty; it occurs e. g. when a Roman citizen emigrates to a Latin colony. But in Justinian's time, since every member of the Roman Empire who was free was, at the same time, a Roman citizen, media capitis deminutio is only possible in the case of banishment, i. e. expulsion from membership of the Empire.[1]

§ 2 I. de cap. min. (1, 16): Minor sive media est capitis deminutio, cum civitas quidem amittitur, libertas vero retinetur. Quod accidit ei cui aqua et igni interdictum fuerit, vel ei qui in insulam deportatus est.

Severance from one's agnatic family also operates as a capitis deminutio (viz. minima), a destruction of one's personality. For it is in the family that the essence and force of a legal personality lie. To change one's family, therefore, is to change one's personality; it means the destruction of the old personality and the birth of a new one.

A family, however, in the legal sense of the word, signifies, according to the civil law of Rome, something very different from what we are accustomed to associate with the term. By family we mean the aggregate of all persons who are connected by ties of blood-relationship, the aggregate of all members of one and the same *stock*. But a Roman family, within the meaning of the jus civile, consists of the aggregate of all those who belong to one and the same *household*, who are subject to one and the same 'domestic power' (patria potestas), or at any rate would be thus subject, if the common ancestor were still living. This is what is called 'agnatio'. And the civil law recognizes no other kind of relationship but agnatio; it knows nothing of cognatio or blood-relationship. Thus the family of the Roman civil law is the agnatic family (v. infra, § 91). A peculiar characteristic of this agnatic family is that it can be changed. Blood-relationship cannot be destroyed, and a cognatic family, or family in the modern sense, does not admit of change.

[1] Cp. J. M. Hartmann, *De exilio apud Romanos, Dissertatio inauguralis* (Berolini, 1887). The same writer in the *ZS. der Sav. St.*, vol. ix. p. 42 ff. Deportation is a particular form of banishment; cp. supra, p. 176.

But a person can separate himself from an agnatic family, because he can separate himself from the household, i. e. from the community of those who are subject to the same patria potestas. And this is what happens to a daughter who marries, provided she thereby enters the marital (i. e. domestic) power of her husband (in manum conventio), or of the person to whose patria potestas her husband is subject, though (as we shall see, § 92) such a result is by no means the invariable effect of a woman's marriage. Having passed from one patria potestas to another, she has thereby changed her family (her agnatic family, namely); she has changed her entire circle of relations (agnatic relations, namely); she has changed the household to which she belongs; in a word, she has undergone a complete change of personality. The same thing happens to a filiusfamilias, when his father sells him into bondage (mancipium, § 101), or gives him in adoption (datio in adoptionem); and again to a person sui juris, when he suffers himself to be adopted by another (arrogatio); or lastly, to a filiusfamilias, when his father emancipates him from the paternal power (emancipatio). And it is to be noted that, in spite of the fact that the emancipatus actually improves his outward position by becoming a paterfamilias instead of a filiusfamilias, he nevertheless undergoes capitis deminutio, because the rupture of his agnatic ties involves the destruction of his previous legal personality and the creation of a new one.

Capitis deminutio minima, then, means the severance from one's agnatic relationship, from one's household, and it occurs in five cases, viz. in the case of mancipio dare, of in manum conventio, of datio in adoptionem, of arrogatio, and of emancipatio.

There were two further incidents of capitis deminutio minima that flowed as consequences from the destructive effect which it had in common with the other forms of capitis deminutio. First, it was a rule of the civil law that capitis deminutio minima extinguished the contractual debts of the capite minutus. The praetor, however, subsequently restored to the creditors their rights of action by means of in integrum restitutio. Secondly, capitis deminutio minima extinguished all personal servitudes to which the capite minutus had been entitled (infra, § 69, I). This latter rule was only abolished by Justinian. According to the law as laid down in the Corpus juris personal servitudes are only extinguished by capitis deminutio maxima and media.

GAJ. Inst. I § 162 : Minima est capitis deminutio, cum et civitas et libertas retinetur, sed status hominis commutatur. Quod accidit in his qui adoptantur, item in his quae coemptionem faciunt, et in his qui mancipio dantur quique ex mancipatione manumittuntur : adeo quidem ut quotiens quisque mancipetur aut manumittatur, totiens capite deminuatur.

L. 11 D. de cap. min. (4, 5) (PAULUS) : Capitis deminutionis tria genera sunt : maxima, media, minima ; tria enim sunt quae habemus : libertatem, civitatem, familiam. Igitur cum omnia haec amittimus, hoc est libertatem et civitatem et familiam, maximam esse capitis deminutionem. Cum vero amittimus civitatem, libertatem retinemus, mediam esse capitis deminutionem ; cum et libertas et civitas retinetur, familia tantum mutatur, minimam esse capitis deminutionem constat.

§ 36. *Existimationis Minutio.*

The term 'honour' refers, in the first instance, only to social relations. To be 'honoured' is to be allowed one's full worth in society. Society treats those as entitled to honour who act in accordance with its views. The award or denial of honour, in other words, of social worth, is the sanction by means of which society enforces on individuals, not merely the commands of law and morality, but more specifically the decrees of mere usage, which may conceivably run counter to law and morality. The particular kind of conduct which society requires from the individual assumes different forms in reference to the different sections into which society is divided, and it is in this sense that we speak of the honour of a particular class, of military honour, professional honour, and so on.

The effect which social relations and social views produce upon the law finds expression in the legal rules concerning 'existimatio', or civic honour. The law yields, to some extent, to the judgement pronounced by society and, in certain circumstances, imposes legal disabilities on persons whom society has declared to fall short of the standard it requires. Civic honour (in the legal sense) means full qualification in the eye of the law. Loss of honour (in the legal sense) means partial disqualification in the eye of the law.

The civic honour of a civis Romanus may be destroyed (consumtio existimationis), viz. by capitis deminutio maxima or media ; or it may be merely impaired (minutio existimationis). And it is in this last and narrower sense that the expression 'loss of civic honour' is technically applied. Minutio existimationis may be

defined as the impairment of a man's civic honour which, without producing capitis deminutio (in other words, without destroying his previous personality), merely operates to diminish his personal qualifications in the eye of the law.

In the Roman civil law, existimationis minutio only occurs: (1) in the cases determined by popular enactments;[1] (2) in consequence of a reprimand from the censor. But here again the jus honorarium outstripped the civil law. Towards the close of the Republic the censor ceased to exercise his old functions and the vacancy thus created was supplied by the praetor. For the praetorian edict was concerned with persons whose civic dignity was impaired in so far as their disabilities in regard to judicial proceedings came into question. Thus the praetor in his edict enumerated those to whom, as persons of tarnished reputation, he would refuse the full jus postulandi, i. e. to whom he would deny the right to make applications to the court (postulare) otherwise than on behalf of themselves or certain close relations. In another part of the edict he specified those to whom, as persons of tarnished reputation, he declined to grant the right of acting as the agent of another in an action (alieno nomine agere) or of being represented by an agent in an action.[2] But in thus denying to certain parties full legal capacity in judicial proceedings (including, *inter alia*, the unrestricted jus postulandi) the praetor did not directly pronounce them 'infames'. He had neither occasion nor power formally to curtail the civic honour which a person enjoyed. But, says Gajus, 'those whom the praetor places under such disabilities *we call infamous*'.[3] It was, then, in the lists contained in the praetorian edict that the views which society took of the cases of existimationis minutio found legal expression and were, so to speak, codified; imperfectly, it is true, but nevertheless in such a way as to be decisive of the future attitude of the law towards civic honour. And it was from these

[1] Thus e. g. the Twelve Tables (viii. 22) declared: qui se sierit testarier libripensve fuerit, ni testimonium fatiatur, improbus intestabilisque esto.

[2] Karlowa, *ZS. für RG.*, vol. ix. p. 222 ff.; Lenel, *ZS. der Sav. St.*, vol. ii. p. 54 ff.; Wlassak, *Zur Geschichte der Cognitur* (1893), p. 18, n. 3; p. 72, n. 53 ad fin.

[3] Gaj. iv. 182 (Studemund, ed. 2): Nec tamen ulla parte edicti id ipsum nominatim exprimitur ut aliquis ignominiosus sit; sed qui prohibetur et pro alio postulare et cognitorem dare procuratoremve habere, item procuratoris aut cognitoris nomine judicio intervenire, ignominiosus esse dicitur. V. infra, note 5.

sections of the praetorian edict that Justinian's compilers took their catalogue of cases of existimationis minutio. There were, more particularly, two groups of cases which were contrasted with one another, the cases of 'infamia immediata', and of 'infamia mediata'. Infamy was said to be 'immediate', if it attached to a person at once, ipso jure, on the commission of some act which deserved to be visited with social disgrace. Thus it attached to persons engaged in a disreputable trade, to soldiers ignominiously discharged from military service, to persons in the relation of a double marriage or double betrothal. On the other hand, infamy was said to be 'mediate', if it did not attach directly, but only after a court of law had passed judgement on the delinquent on the ground of some act which deserved to be visited with social disgrace. Such was the effect above all things of every criminal sentence touching life, limb, or liberty. A similar result however followed condemnation in certain civil cases, especially if judgement were given against a person in a civil action on account of a dishonourable breach of duty (as guardian, partner, depositary, or agent). Those civil actions in which condemnation entails infamy are called 'actiones famosae'.

No codification of the law of honour can, in the nature of things, be complete. It was necessary, therefore, to allow the Roman judges a discretionary power to take account of such cases of infamy as had not been specified in any statute or in the praetorian edict. Looked at from this point of view, there were two kinds of existimationis minutio, 'infamia' and 'turpitudo'. In the case of 'infamy' the conditions under which it should attach were fixed by the law, viz. by statutes and the praetorian edict. In the case of 'turpitudo', the conditions under which it should attach were fixed, not by the law, but by the free discretion of the judge acting, in each individual case, on the verdict of public opinion, in other words, on the verdict of society.

Both these forms of minutio existimationis (infamia and turpitudo) produce this result that the judge, acting on his own discretion, may take them into account, wherever the character of the person affected is concerned. He may decline, for example, to admit such a person as a witness or to allow him to act as a guardian. Or again, if an infamis or turpis is instituted in a will, the judge may admit the brothers and sisters of the deceased to

the querela inofficiosi testamenti (§ 113). The following effects, moreover, are peculiar to infamy: it extinguishes the jus suffragii and the jus honorum; it restricts the jus connubii (by disqualifying the infamis from marrying any freeborn person, v. § 99); and it also restricts the right to make applications to the court on behalf of others (supra, p. 183). But these special disqualifications incident to infamy have ceased to exist in Justinian's time.[4] As far as a man's personality, as such, is concerned, the only effect, under Justinian's law, both of infamy and turpitude is that the persons affected are liable to be subjected to certain disabilities by the judge in the exercise of his judicial discretion.

L. 5 § 2 D. de extr. cogn. (50, 13) (CALLISTRATUS): Minuitur existimatio quotiens, manente libertate, circa statum dignitatis poena plectimur, sicuti cum relegatur quis, vel cum ordine movetur, vel cum prohibetur honoribus publicis fungi, vel cum plebejus fustibus caeditur vel in opus publicum datur, vel cum in eam causam quis incidit quae edicto perpetuo infamiae causa enumeratur. § 3: Consumitur vero, quotiens magna capitis minutio intervenit.

L. 1 D. de his qui not. inf. (3, 2): Praetoris verba dicunt: INFAMIA NOTATUR[5] QUI AB EXERCITU IGNOMINIAE CAUSA AB IMPERATORE EOVE CUI DE EA RE STATUENDI POTESTAS FUERIT DIMISSUS ERIT; QUI ARTIS LUDICRAE PRONUNTIANDIVE CAUSA IN SCAENAM PRODIERIT; QUI LENOCINIUM FECERIT; QUI IN JUDICIO PUBLICO CALUMNIAE PRAEVARICATIONISVE CAUSA QUID FECISSE JUDICATUS ERIT; QUI FURTI, VI BONORUM RAPTORUM, INJURIARUM, DE DOLO MALO ET FRAUDE SUO NOMINE DAMNATUS PACTUSVE ERIT; QUI PRO SOCIO, TUTELAE, MANDATI, DEPOSITI SUO NOMINE NON CONTRARIO JUDICIO DAMNATUS ERIT; QUI EAM QUAE IN POTESTATE EJUS ESSET GENERO MORTUO, CUM EUM MORTUUM ESSE SCIRET, INTRA ID TEMPUS QUO ELUGERE VIRUM MORIS EST, ANTEQUAM VIRUM ELUGERET, IN MATRIMONIUM COLLOCAVERIT, EAMVE SCIENS QUIS UXOREM DUXERIT NON JUSSU EJUS IN CUJUS POTESTATE EST; ET QUI EUM QUEM IN POTESTATE HABERET, EAM DE QUA SUPRA COMPREHENSUM EST, UXOREM DUCERE PASSUS FUERIT; QUIVE SUO NOMINE NON JUSSU EJUS IN CUJUS POTESTATE ESSET, EJUSVE NOMINE QUEM QUAMVE IN POTESTATE HABERET, BINA SPONSALIA BINASVE NUPTIAS IN EODEM TEMPORE CONSTITUTAS HABUERIT.

[4] The jus suffragii and the jus honorum had lost all practical meaning, the prohibition of marriages had been abolished, and the judge was given entire discretion as to whether he would allow a person to make an application to the court or not (§ 11 I. de except. 4, 13).

[5] These first two words are due to Justinian's compilers (v. Lenel, *loc. cit.*). Lenel's conjectures have been brilliantly verified by the text of Gajus iv. § 182 (v. note 3) which has only now been definitely ascertained. As to the restoration of the original words and context of the praetorian edict here under discussion v. Lenel, *Edictum perpetuum*, pp. 62, 63.

CHAPTER II

JURISTIC PERSONS

§ 37. *The Nature of a Juristic Person.*

To affirm the existence of juristic persons is to affirm the existence, as an economic fact, of a particular kind of property which may be described as *social* property, or property appropriated to the purposes of society—property, in other words, which cannot be legally employed otherwise than for the purposes of the community (or society) as a whole (§ 30). The private property of natural persons—which is the only private property in the full sense of the term—requires to be supplemented by public property, by property devoted to the common good, and this object is effected through the conception of a juristic person.

A study of history will show that different legal forms have been resorted to at different stages of the evolution of law for the purpose of giving shape and effect to this notion of public property. The form with which we are familiar nowadays is that of a juristic person, and our very familiarity may tempt us to think that it is the only possible form, and that the idea of a juristic person is a self-evident and natural idea which would readily suggest itself to primitive peoples. As a matter of fact, however, the conception of a juristic person is the product of a very advanced stage of legal development.

The crude view of the matter would be that property intended for general public purposes—the property of a political community or the State—should be regarded as the *common* property of all those whose interests it is designed to serve, the common property, for example, of the members of a community or of the citizens of a State. German law consistently adhered to this somewhat primitive point of view throughout the Middle Ages. According to the mediaeval German law property devoted to common purposes was covered by the legal conception of collective ownership, collective ownership being a species of joint ownership. The property of the community —e.g. the 'almende' of the 'associations of the mark' (which were

the rural communities of German law)—was the property of all the members of the community, and in the same way the property of the State—the so-called folk-land—was the property of all the members of the State, in other words, of the people constituting the State. The individual members had no power to dispose of property of this class—they could not, for example, alienate any portion of it—but still the ownership of the property was not deemed to vest in the community as a whole, but in the sum-total of the constituent members: in the eye of the law *they* were, collectively, the subjects or bearers of the rights appertaining to the property. According to mediaeval German law property appropriated to the purposes of any body or society was simply the common property of all the *natural* persons who constituted that body or society. The conception of a juristic person was as yet unknown.

In the same way the conception of a juristic person was unknown to the earlier Roman law. The old jus privatum (the jus civile) was throughout a law for the individual (the civis) only, and hence, as far as the ancient private law of Rome was concerned, there could be no subject of rights and duties other than a natural person, i. e. an individual. There were indeed, even in the old times, societies (collegia, sodalitates), but none that enjoyed proprietary capacity. The property designed for the purposes of the society had to be formally vested in an individual member and treated as though it were his separate property. In other words, the idea that a society as such could have property of its own was unknown to the ancient private law of Rome, as far at least as *private* societies were concerned. And as regards property designed for public use—the property of the State (i. e. the community of Roman burghers) and the property of the national gods—it was treated as belonging to the category of 'res extra commercium', that is, of things standing outside the range of ordinary dealings (infra, § 59 I). Now the Roman State was identical with the Roman people: whatever belonged to the State, belonged to the Roman people; it was 'res publica' ('populica'). Res publicae were thus opposed to res privatae. They were not, in fact, owned by any private individual nor could they, in law, be so owned. The populus Romanus was not a private individual; it was not, in other words, a juristic person. Whatever it possessed, was extra commercium, i. e. could neither be owned nor in any way disposed of by private persons.

But unlike the Germans, the Romans did not regard their State lands (the ager publicus) as the common property of the several members of the State; their view was rather that State property was no man's property, a 'res nullius', which could not be owned by anybody.[1] The Roman people was not a civis. Roman law, the jus civile, had no legal forms which would fit the case of State property and bring it within any of the recognized categories of private law. State property was accordingly regarded as lying outside the scope of private law altogether, it was extra commercium and appertained exclusively to public law. What was true of the property of the Roman State (the ager publicus and the aerarium) was equally true of its proprietary dealings. The Roman State, the populus Romanus, concluded its legal transactions—its sales, its leases, and so forth—through its magistrates, but all such transactions were governed, not by jus privatum, but by jus publicum. They did not give rise to actions in the ordinary civil courts. The law was not available against the State as against a private individual. The State protected its property—the res publicae—on principle by the administrative acts of its magistrates, and if a private individual sought redress in respect of a transaction concluded by the State, he could not proceed by the ordinary legal procedure, but had to resort to administrative proceedings by lodging his complaint at a public office. In its proprietary as in its other relations the State always remained the State, the bearer of sovereign rights, and as such was consistently paramount over the individual citizen; under no circumstances were they treated

[1] A trace of this view is to be found even in Gajus, l. 1 pr. D. de div. rer. (1, 8): quae publicae sunt, *nullius* in bonis esse creduntur, ipsius enim universitatis esse creduntur: privatae autem sunt, quae singulorum sunt. In the last words Gajus gives expression to the idea of the earlier law that only a 'singulus' can be regarded as a private person. The same idea that, as far as private law is concerned, there can be no persons other than natural persons, and that the rights of a municipium are, properly speaking, simply the rights of the muncipes, recurs even in Ulpian (Fragm. 22, 5): Nec municipia nec municipes heredes institui possunt, quoniam incertum corpus est (because its members change), et neque cernere universi neque pro herede gerere possunt, ut heredes fiant. In Ulpian's words we have at the same time an echo of the crude and primitive notion (which reappears in German law) that the rights of a collective body are simply the rights of all the separate individuals who belong to that body. But the property of all is, from another point of view, the property of no one, in so far as no one can claim it as his separate, private property. The latter point of view was the one which prevailed in the earlier stages of Roman law.

as co-ordinate. The forms of private law, which were adapted exclusively to the requirements of private personalities, were altogether too narrow for the great populus Romanus. That was the reason why the early Roman lawyers never thought of regarding the State as a juristic person, or as a subject capable of holding property in the sense in which these terms were understood in private law. On the ground occupied by the State there was no room for private law. The law was thus only giving formal expression to the practical character of State property by treating it as social or public property, and not as private property. Individual property was the only property recognized by the private law of ancient Rome.

The so-called res sacrae, or things consecrated to the gods, formed a species of res publicae. Like these they lay outside the scope of private law (extra commercium) and were protected by forms of administrative procedure. Thus in regard to res sacrae, again, the idea that established itself was not that they were the private property of a juristic person—e. g. the gods or some religious institution—but rather that they were excluded from all private ownership.

Within the sphere of the jus privatum none but the individual, the natural person, within the sphere of the jus publicum (and jus sacrum) none but the State could, in early Roman law, be the subject of rights.

The conception of a juristic person was not introduced into the private law of Rome till the Empire. During the Empire res publicae, that is, property owned by the State—with the exception however of res publicae in the narrower sense of things *directly* intended for the common usė of all (infra, p. 303)—came to be regarded as res in commercio and, as such, were brought within the range of private law. Thus public property became private property in the same way as the property of individual natural persons was private property. It appears that this result was due, first and foremost, to the development of the system of municipal government which took place towards the close of the Republic. The property of the municipium, or town community, was brought within the rules of private law, the municipium being thus allowed to rank as a person capable of private rights and duties. After the example of these municipalities, 'ad exemplum rei publicae' (that is,

after the example of the communities governed by public law), lawful societies (collegia, sodalitates, universitates) were also acknowledged to have proprietary capacity for purposes of private law. And finally, when the property of the emperor, the fiscus Caesaris, came to be more and more avowedly identified with the property of the State, the Roman State too, in the form of the fiscus, was ranged among the private persons, though the numerous fiscal privileges it enjoyed remained to testify to its original exemption from the rules of private law.

The conception of a juristic person had thus obtained recognition in the Roman law of the Empire. The problem now was to determine its precise nature.

What do we mean by saying that an aggregate of persons, a corporate body—such as, for example, a town or village community —is a person within the meaning of private law? In what sense can a community or a corporation be said to have rights and liabilities? The rule evolved by Roman law during the period of the classical jurisprudence may be stated as follows. The property of a corporation is the property, not of several persons, but of *a single person:* the 'corpus', or corporation as such. For purposes of private law, the corporation, the collective whole, must be regarded as a new, a different person, as an individual distinct from the several individuals of whom the corporation consists. A slave may not be tortured with a view to extorting information against his master, but the slave of a corporation may be compelled, by torture, to give information against the members of that corporation: *nec enim plurium esse videtur sed corporis,* i. e. the slave of a corporation (corpus) is not the joint property of the separate members, but the sole property of another person, an invisible, a juristic person, namely, the corpus. Again: si quid universitati debetur, singulis non debetur, *nec quod debet universitas, singuli debent.* In other words, the rights of a corporation (e. g. of a town community) are not the rights of those who belong to the corporation, and the liabilities of a corporation are not the liabilities of the members of the corporation. The individual members of the corporation cannot be made answerable for the debts of the corporation. Rights and liabilities of a corporation do not mean joint rights and joint liabilities of the members, but sole rights and sole liabilities of another person, an invisible, a juristic person, namely, the corpus.

This collective whole, this invisible unity of members living and acting by means of the corporate constitution, in a word, the organized body, is a new subject of rights and duties, a new private person distinct from all the persons that constitute the body. The juristic person of Roman law is an organized body which is capable of having rights and liabilities of its own. The property of a juristic person—such as a town community—is the property of the body and not of the several persons who constitute the body. The debts of a juristic person are the debts of the body, and not of the several persons who constitute the body. The collective whole, as such, can hold property; its property, therefore, is, as far as its members are concerned, another's property, and its debts are another's debts.

This sharp line of demarcation between the collective person and the separate members represents the fundamental idea developed by Roman law. From the point of view of private law, the collective person and its members have nothing whatever to do with one another. As far as the property of the whole is concerned, the members are not members, but strangers. The collective person, the organized body capable of rights and liabilities, is quite a different person, a juristic person, a third person, over and above the natural persons who are its members.

It is at the moment when the corporate bodies of social life which stand above the individuals—more especially when such great organizations as the State, the Church, the town and village community, which are governed by public law—step into the domain of the law of property (i. e. of private law) in order to assert their claim to be admitted (in the interests of society and consequently of all) to share in the goods of this world on equal terms with individuals—it is at this moment that the legal rules concerning juristic persons come into play. Roman private law had originally no room for these huge corporate personalities so vastly exceeding the dimensions of the individual personality. Originally, it was neither capable nor desirous of supplying the law for any other proprietary relations but those of private persons in the proper sense of the term, i. e. individual persons. Nevertheless the Roman lawyers succeeded, as we have seen, in securing the recognition of corporations within the domain of private law. But it was just the very difficulty which Roman law had to solve

that made its doctrine of juristic persons so conclusive in its lucidity. Roman private law—such is the reasoning—endeavours to be a law for the individual person. If therefore the corporate collective person is to be admitted to private law, it must first, as a matter of form, discard all its social characteristics, it must discard all that power by which it transcends the dimensions of an individual person; the sovereign State itself must put aside its majesty, before it can pass into the humble realms of private law. However public, in other respects, the character of a corporation, such as the State or a community, may be, the keen analysis of Roman private law reduces it to a new kind of private person which takes its place in the ranks of other individuals, or natural persons. Formally, the public property of the State is treated as the private property of a juristic person. By this means the traditional conceptions of private law—the conception of a person as an individual, of individual property and individual liabilities—can be applied, without alteration, to these new corporate subjects of private rights and duties. In point of law, the collective person, the organized social body, is a new individual like other individuals. Hence the clear line which separates the collective person from the persons of its members, and the property of the organized body from the property of the persons that constitute it. Roman law contrived to accomplish a veritable masterpiece of juristic ingenuity in discovering the notion of a collective person; in clearly grasping, and distinguishing from its members, the organized body as the ideal unity of the members bound together by the corporate constitution; in raising this body to the rank of a person (a juristic person, namely), and in securing it a place in private law as an independent subject of proprietary capacity standing on the same footing as other private persons. German law never got beyond the notion of the natural person visible to the physical eye. True, it succeeded in working out the idea of a community of legal rights and duties in a larger variety of forms than Roman law, and the practical results which it was able to achieve within the German communities and associations by means of a system of common property (of societies), coupled with an organized method of administration, were the same as those achieved by Roman law with its conception of a juristic person. True also, that in the local laws of German towns the beginnings of an attempt to treat

the town community as an independent subject of rights and duties are already discernible. Nevertheless, the simple formula which declares that the property of an organized social body is the sole property of a new ideal subject, and thus, while introducing the property of the collective whole (social property) into the sphere of private law, at the same time marks it off clearly and sharply from the property of the individual members of the organized body—the formula, in other words, of the juristic person—was discovered in the domain of Roman law and was adopted in Germany from Roman law by means of the 'reception'.[2]

[2] On the above subject, see Mommsen, *De collegiis et sodalitiis Romanorum* (1843); Gierke, *Das deutsche Genossenschaftsrecht*, vol. iii. (1881) pp. 34–106; Gierke, *Deutsches Privatrecht*, vol. i. (1895) p. 456 ff.; Karlowa, *Röm. RG.*, vol. ii. pp. 1 ff. and 59 ff.; Sohm, *Die deutsche Genossenschaft* (Festschrift für Windscheid, 1888).

The historical exposition embodied in the text shows clearly that the question whether property devoted to common social purposes is, in law, the property of no one or the property of a juristic person, is a question, not of logic, but of positive law. As a matter of economic fact, no particular person has any defined interest in such property; it exists for the common good, and it is quite conceivable that the law should view it in the same light, that is, as ownerless property which can only be legally used in accordance with the purposes to which it is devoted. But the result of this view (which was the view of early Roman law) is to make social property a res extra commercium, thereby placing it outside the range of private law altogether. According to the other view social property is legally the property of some definite person or persons. As to who such person or persons are there are two possible alternatives: the law may treat social property either as the common property of a number of natural persons (as was the case with German law) or as the sole property of a juristic person (as was the case with the later Roman law). We are unable, however, to accept the contention put forward by Brinz (*Pandekten*, 3rd ed., vol. i. p. 224 ff.) that the conception of property appropriated to a particular purpose ('Zweckvermögen,' as German jurists now call it) merely represents a formula for describing such social property as falls within the limits of private law. The exact reverse appears to be the truth. Private law recognizes no property at all but the property *of persons*. And with regard to the much-debated question whether juristic persons are 'fictitious' or 'real' persons, history again furnishes the answer. According to a theory propounded by the civilians (which, up to the present at any rate, has been the prevalent theory on the subject) juristic persons are fictitious persons; according to the Germanistic theory, which has found its leading and most vigorous champion in Gierke, they are 'real' persons. The issue in this dispute (which is not always brought out very clearly) may be put in this way: Is the juristic personality of the organized bodies of society something *made* by the law? Is it (to use the somewhat inappropriate expression of many writers) a *fiction* of the law? Or is it rather something which the law *finds* among the phenomena with which it has to deal? Is it one of the *data* of positive law, and in that sense 'real'? A defence of the latter view will be found, for example, in Gierke's *Deutsches Privatrecht*, where the learned author maintains (vol. i. p. 468) that 'from the earliest times and

L. 1 § 1 D. quod cujusque univ. nom. (3, 4) (GAJUS): Quibus autem permissum est corpus habere collegii, societatis sive cujusque

among all nations organized bodies have been recognized, over and above separate individuals, as subjects of legal rights and duties,' and that the only 'changes that have occurred have been changes in the form in which the personality of these bodies has found expression'. It is difficult to see how this view can be reconciled with the evidence furnished by the history of both public and private law. But within the domain of public law the idea that the great organized body which we call 'the State' or 'the Empire' is a single person, and, as such, the bearer of the rights of government (an idea of which no trace is to be found in the older German law) was the outcome of a very gradual development extending over a long period, and was not fully worked out till quite modern times. Positive law finds among its data but one kind of personality, and that is the personality of human beings, which personality is the postulate and source of all legal development. The personality of organized bodies, on the other hand, is a thing which positive law *creates for itself* at a particular stage of its development. That is what the term '*juristic* person' is meant to convey, and it would be difficult to find a more appropriate expression. The creation of juristic persons, in other words, the recognition of organized bodies as independent subjects of legal rights, on a par with, though distinct from, the separate individuals who compose them, is emphatically the work of positive law. It does not however follow, because juristic persons are the creations of positive law, that they are therefore fictions. Juristic persons are no more fictions than, say, the conception of ownership is a fiction. In the eye of the law they are, in the fullest sense, persons, that is, subjects of legal rights and duties, and, to that extent, 'real,' as far as modern law is concerned. Rights can be acquired and liabilities incurred in the name of a juristic person, and any right so acquired can only be disposed of in the same name. Indeed to have a personality really means in law nothing more than to have a name, or (as the Romans put it) a head (caput), recognized by the law. In the register of names—that is, of persons—recognized by private law, juristic persons are entered in precisely the same way as natural persons. But the two classes of persons are not there by the same title: natural persons are there by virtue of their natural personality, the personality with which they are born; juristic persons are there by virtue of the personality which positive law has conferred upon them. The recognition of the rule that property devoted to common social purposes is *private* property, and is, moreover, the sole property of a single person—viz. the organized body as such—belongs to a late period in the historical development of the law. The outcome of this development has been to constitute society, in the form of its different organized bodies, a new subject of legal rights (for purposes of private law, in the first instance), side by side with the original, the born subjects of legal rights, viz. individual human beings. And what, it may be asked, was the object of creating these new persons? It was to enable the community as a whole to take part in the economic life of the nation on the same terms as the individual. There is a particular stage at which the organized bodies of society—such as the State or the municipalities—are driven to make independent provision for the wants of the community as a whole (in regard, for example, to military matters, education, and so forth); in other words, they are driven to set up separate *establishments* of their own distinct from those of any individual member of the community. It is at this moment that the creation of the juristic persons of private law becomes a matter of practical necessity. A separate

alterius eorum nomine, proprium est ad exemplum rei publicae habere res communes, arcam communem, et actorem sive syndicum, per quem tamquam in re publica, quod communiter agi fierique oporteat, agatur, fiat.

L. 7 § 1 eod. (ULPIAN.): Si quid universitati debetur, singulis non debetur, nec quod debet universitas, singuli debent.

L. 1 § 7 D. de quaest. (48, 18) (ULPIAN.): Servum municipum posse in caput civium torqueri saepissime rescriptum est, quia non sit illorum servus sed rei publicae, idemque in ceteris servis corporum dicendum est: nec enim plurium servus videtur, sed corporis.

L. 16 D. de verb sign. (50, 16) (GAJUS): Civitates enim privatorum loco habentur.

§ 38. *Societies and Foundations.*

We distinguish two kinds of organized bodies, 'corporations' (Körperschaften) and 'institutions' (Anstalten). A corporation is an organized body which governs itself; an institution is an organized body which is governed by the intention of its founder. The organized bodies created by public law—e.g. the State, municipalities, ecclesiastical corporations and institutions—are the corporations and institutions of public law; those created by means prescribed by private law are the corporations and institutions of private law. We shall call the corporations of private law 'societies' (Vereine) and the institutions of private law 'foundations' (Stiftungen).

The organized bodies of public law derive their corporate capacity

establishment necessarily presupposes separate property. If therefore the community is to conduct a separate establishment of its own, a legal form is required to enable it to acquire and hold property of its own. And it is to meet this very requirement that the law *creates* the conception of a juristic person. In the same way, within the sphere of public law, it seems pretty clear that the view which regards a single organized body—viz. the State—as the bearer of the public powers of government, merely marks a particular stage of legal development, and is not the expression of an immutable axiom of natural law. In modern times society claims for itself that public authority which at one time belonged to the ruler alone and, at a still earlier period, to all the members of the community jointly. The juristic person is accordingly the particular legal form (as developed, in its main features, by the lawyers of the Roman Empire) under which, in modern law, the separate establishments which provide for the common wants of the community are carried on, and it is, at the same time, the legal form in which the sovereign authority of the community finds expression. The juristic person is not rooted in the 'personality' supposed to belong, by some law of nature, to 'every organized body as such'. It is simply the positive form (based on Roman law) in which modern law gives expression to the power to which organized bodies have attained in the gradual evolution of history.

for legal rights, in other words, their juristic personality, from rules of public law. With us, every corporation and institution of public law is a juristic person (for purposes both of public and private law) by virtue of a general rule of law. A juristic personality or corporate capacity need not be expressly conferred on it. Indeed, it was to meet this very case of public bodies that juristic persons were created, the desire being to clothe the property of public corporations and institutions (which is social property designed for the common good) in such a form as would enable the objects for which it exists to be most effectively secured.

The organized bodies of private law—societies and foundations—stand on a different footing. The interests which it is sought to serve by the incorporation of private societies and by foundations are the private interests of individuals. The notion of a juristic person was developed in order to meet the requirements of public property. The question arises whether the law shall permit the same notion to be utilized in furtherance of private objects? We have seen how, by means of the conception of a juristic person, property designed for general public objects was effectively and permanently secured for such objects, the method being to vest the title to the property in an ideal person in whose name alone it could be validly dealt with. Should the law allow the same method to be applied for the purpose of permanently appropriating property to a particular object in the interests of private persons? Roman law answered this question in a different way from modern German law.

Roman law adhered consistently to the rule that to sustain a juristic personality is the privilege of *public* corporations and institutions.

In the first centuries of the Empire we have several instances of charitable foundations established by the emperors for Italy, with the object of distributing alms in support of poor children. They are State institutions, and are regarded in law as detached and independent portions of the 'fiscus', or property of the State. It was not competent for a private individual to create a foundation with separate property—in other words, with a separate legal personality—of its own. A private individual might make over property, by way of gift or legacy, to a juristic person already in existence (say, a municipal corporation), and might, at the same time, prescribe the particular object for which such property was

to be employed, by directing it, for example, to be spent on banquets and entertainments.[1] The effect of such a transaction was to create a foundation in the non-technical, the wider sense of the term; that is to say, the dedication of the property merely gave rise to an *obligation*, the recipient corporation being legally bound to devote it to the objects prescribed by the donor. But a private foundation of this kind was not a foundation in the legal sense. The donor did not create a *new* juristic person capable of holding the dedicated property as its own separate property, the effect of the dedication (as already stated) being merely obligatory. The effect of a foundation proper, on the other hand, is *real* in the sense that it directly affects the title to the property itself: it severs the property from all other property and vests it in a new owner distinct from all other owners, in whose name alone it can be legally dealt with.[2] As far then as the Roman law of the earlier Empire was concerned, the only foundations which it recognized were the institutions existing in the name of the emperor, in a word, the institutions of the State.

During the later Empire—from the fifth century onwards—foundations created by private individuals came to be recognized as foundations in the true legal sense, but only if they took the form of a 'pia causa' ('pium corpus'), i. e. were devoted to 'pious uses', only, in short, if they were charitable institutions. Wherever a person dedicated property—whether by gift inter vivos or by will—in favour of the poor, or the sick, or prisoners, orphans, or aged people, he thereby created ipso facto a new subject of legal

[1] On this topic see Pernice, *Labeo*, vol. iii. pp. 150 ff., 164 ff.

[2] If a person were to found a scholarship by giving a sum of money to a university and directing the scholarship to be paid out of the interest, this would be a foundation in the non-technical sense. The money would not be the property of the foundation, because a foundation of this kind is not a juristic person; it would be the property of the university, and the effect of the transaction would merely be to bind the university to apply this particular portion *of its own property* in the manner prescribed by the donor. The direction to use the money in a particular way does not affect the title to the property; all it does is to create a legal duty to apply the property in a particular manner. On the other hand, if the founder were to clothe his foundation with an independent personality of its own and to make his endowment the separate property of the foundation itself, we should have a foundation in the full legal sense. A foundation in the non-technical sense consists in the dedication of property by making it over to an existing subject of legal rights; a foundation in the legal sense consists in the dedication of property by severing it from all other property and vesting it in a new subject of legal rights.

rights—the poor-house, the hospital, and so forth—and the dedicated property became the sole property of this new subject; it became the property of the new juristic person whom the founder had called into being. Roman law, however, took the view that the endowments of charitable foundations were a species of Church property. Piae causae were subjected to the control of the Church, that is, of the bishop or the ecclesiastical administrator, as the case might be. A pia causa was regarded as an ecclesiastical, and consequently, as a public institution, and as such it shared that corporate capacity which belonged to all ecclesiastical institutions by virtue of a general rule of law. A pia causa did not require to have a juristic personality expressly conferred upon it. According to Roman law the act—whether a gift inter vivos or a testamentary disposition—whereby the founder dedicated property to charitable uses was sufficient, without more, to constitute the pia causa a foundation in the legal sense, to make it, in other words, a new subject of legal rights. But the rule which declared that no foundation created by a private person could be a foundation in the true legal sense—that is, a juristic person capable of holding separate property of its own—unless it were a pia causa, is really identical with that other rule of Roman law according to which public institutions are the only institutions capable of sustaining a juristic personality, the term public institutions including both the institutions of the State and (in the Christian era) ecclesiastical institutions.

L. 48 C. de episc. (1, 3) (JUSTINIAN.): Si quis—captivos scripserit heredes—sancimus talem institutionem—valere—. § 1: Sed et si pauperes quidam scripserit heredes et non inveniatur certum ptochium vel certae ecclesiae pauperes—et hujusmodi institutionem valere decernimus. § 2: Et si quidem captivos scripserit heredes, civitatis—episcopus et oeconomus hereditatem suscipiant et omnino in redemptione captivorum procedat hereditas—nullo penitus ex hoc lucro vel oeconomo vel episcopo vel sacrosanctae ecclesiae relinquendo.

The law of the Roman Empire treated societies in the same way as foundations. With but few exceptions all societies were, on principle, prohibited. The law recognized no freedom of association.[3] Only those societies were lawful which owed their

[3] On the above topic cp. Pernice, *Labeo*, vol. i. p. 289 ff.; Mommsen, *Staatsrecht*, vol. ii. p. 886.

existence to a lex specialis, or 'privilege'. A lawful society—such was the view taken—cannot be the creation of a private individual; it can only be the creation of the State operating through the medium of a statute—the lex collegii, namely, which might be an imperial statute or a senatusconsultum. But a society duly constituted by public statute must—it was argued—itself form part of the organization of the State. Like the corporations of public law therefore—'ad exemplum rei publicae' (l. 1 § 1 D. 3, 4; cited supra, pp. 194, 195)—lawful societies were entitled to hold corporate property by virtue of a general rule of law. In this instance again, there was no necessity for any express grant of a juristic personality. According to Roman law, indeed, a juristic personality as such could not be acquired by express grant at all. The only rule known to the law of the Empire was the general rule recognizing all public corporations and institutions as juristic persons. The conception of a juristic person was a legal form exclusively designed for, and applicable to, public property, and the only way in which both societies and foundations could acquire a juristic personality was by being admitted to the circle of public corporations and institutions.

L. 1 pr. D. quod cujusque univ. (3, 4) (GAJUS): Neque societas neque collegium neque hujusmodi corpus passim omnibus habere conceditur: nam et legibus et senatusconsultis et principalibus constitutionibus ea res coercetur; paucis admodum in casibus concessa sunt hujusmodi corpora.—Cp. l. 3 § 1 D. de colleg. (47, 22).

L. 20 D. de reb. dub. (34, 5) (PAULUS): Cum senatus temporibus divi Marci permiserit collegiis legare, nulla dubitatio est quod, si corpori cui licet coire legatum sit, debeatur: cui autem non licet si legetur, non valebit nisi singulis legetur: hi enim non quasi collegium, sed quasi certi homines admittentur ad legatum.

The general rule of law according to which private foundations and private societies are capable, as such, of acquiring a corporate existence, only obtained recognition in the course of that further development of the law which took place within Germany itself, and even then the rule was only adopted with definite reservations.

The Reformation resulted in the severance of the connexion between the Church and charitable institutions. Henceforth every foundation as such—even a foundation for 'pious uses'—was regarded as a temporal concern. The State took the control of foundations into its own hands. Charitable foundations ceased

to occupy any exceptional legal position, and all foundations came to be recognized as equally capable of acquiring a corporate existence. Coupled, however, with this recognition a further rule was subsequently developed that no private foundation whatever, whether charitable or otherwise, could acquire a corporate existence, unless a juristic personality were expressly conferred on it by the State. In modern Germany there is no general rule of law operating ipso vigore to invest any particular kind of private foundation with a juristic personality. In order to constitute a foundation in the legal sense—that is, a private institution capable of having property of its own—two legal acts are requisite: first, the act whereby the founder purports to create the foundation (in other words, the act whereby he dedicates some property of his to a specified purpose); and secondly, the grant of a juristic personality by the State, in other words, the 'assent' (to use the term of the Civil Code) of the State to the creation of this new subject of legal rights. The endowment of a foundation involves the permanent appropriation of property to a particular object, and that is a matter which requires the approval of the State. It is expedient that private foundations should be capable of acquiring a corporate existence, but the State claims the right to co-operate in such a result, because, as a matter of fact, the right to create a legal foundation is equivalent, to this day, to a right to place private property on the same level as public property.

German Civil Code, § 80: The creation of a foundation with corporate rights requires, in addition to the act of the founder purporting to establish it, the assent of the Federal State within whose territory the foundation is intended to be domiciled.

The subsequent history of societies was similar to that of foundations. From the sixteenth century onwards the system of absolute government, with its rigorous control of private life, struck root in Germany as elsewhere. Such a system was obviously quite as hostile to private societies as the Roman monarchy. It refused altogether to recognize the principle of free association, and required the sanction of the State for the formation of any society whatsoever. No society was allowed to have corporate rights without an express grant from the State. Within the sphere of public law, indeed, the right of free association was (in principle at least) re-established in the course of the nineteenth century. In other words,

it came to be admitted that, as far as public law is concerned, the sanction of the State is not—generally speaking—required for the formation of a private society. As regards private law, however, the after-effects of the former absolutism are clearly traceable to this very day. It is true, the legislation of modern countries, more particularly of the German Empire, has in many instances laid down general rules of law which operate, of their own force, to confer corporate rights on certain classes of private societies, such as joint-stock companies, societies with limited liability (as regulated by the Imperial Statute of April 20, 1892), and registered mutual benefit associations. And the German Civil Code has even enlarged the range of these privileged societies so as to embrace societies formed for some object 'other than that of carrying on a trade or business', such societies being permitted—with certain restrictions, however—to acquire a corporate existence, for purposes of private law, by being entered in the 'Register of Societies'. For the rest, however, the principle still holds good that private societies can only acquire a juristic personality by grant from the State. By forming societies private individuals are able to exercise a very considerable influence on public affairs, and by vesting private property in societies duly qualified to own it, they are able to endow such private property with something of that permanence and that power of indefinite accumulation which are the distinguishing features of public property. Hence the struggle between the two great powers of modern political life, the State and the individual, first, in regard to the lawfulness of societies, and afterwards in regard to their juristic personality, their corporate capacity. The foundations of private law have been well and truly laid, and have shown no signs hitherto of giving way. But there are some ominous indications of a coming upheaval. This corporate personality is an element full of grave possibilities. Like the wonder-working hood of the ancient legend, it renders its bearer invisible and, at the same time, endows him with a strength far exceeding that of any single human being. In the early history of law the conception of a juristic person had enabled the State to take its place side by side with individuals as a subject of legal rights, in order that its property—public property—might participate in the use of the legal forms applicable to private property. The question now arises whether, conversely, the same conception can be, and

ought to be, placed at the service of private persons to enable them to build up a stock of social property, and thereby endow the creations of society with some of that energy and vitality which characterize the corporate bodies formed by the State for public purposes.

GERMAN CIVIL CODE, § 21 : A society not formed for the purpose of carrying on any trade or business can acquire corporate rights by being entered in the Register of Societies of the proper Local Court (Amtsgericht). § 22 : A society formed for the purpose of carrying on any trade or business and not covered by the special provisions of any Imperial Statute * can acquire corporate rights by a grant from the State.

Societies are formed by means of organization : the individual members *subordinate* themselves, in the manner and to the extent required by the objects of the society, to the common will of the society, in order that the society as a collective body may enjoy capacity of action, and may also, if it obtains the requisite corporate capacity, hold property of its own. That is the distinctive feature of a corporation within the meaning of private law (i. e. an incorporated society) as contrasted with a mere partnership (societas). A partnership is formed by means of an obligation. In Roman law a societas was merely a contract like any other contract ; the socii mutually bind themselves to certain acts with a view to some common object ; they bind themselves, for instance, to contribute certain sums of money to defray the expenses of a dinner (infra, § 82). To the outside world, i. e. as against third parties, the societas, in Roman law, is nothing, and the socius is everything. Legally speaking, the societas, as such, can neither act nor hold property, it cannot (to keep to our example) buy the food for the dinner nor acquire the ownership of it nor become liable for its price. All that can only be done by the socii. A societas is merely a legal relationship as between the socii themselves, and has no existence for anybody else. On the other hand, an incorporated society is legally a new subject of rights, a collective whole which the law treats as a single unit fully capable, as against any third party, of acquiring rights and incurring liabilities, fully capable, for example, of concluding a contract or acquiring property or becoming answerable for a debt. A corporation, as such, has

* Cp. supra, § 4, paragraph 2 (p. 7).

separate property of its own; a societas, as such, cannot, strictly speaking, have separate property of its own. The rule in Roman law was, 'tres faciunt collegium': in order to create a corporate body there must be at least three members; whereas a contract of partnership could of course be concluded between two persons. The rule referred to epitomizes the whole antithesis between these two forms of association. A collegium must act on the resolution of the majority, and a majority presupposes at least three members.[4] In order, therefore, that a collegium as such—the ideal aggregate—may have a will of its own and perform acts of its own, distinct from the will and the acts of the individuals, there must be at least three members. The moment three persons constitute themselves an incorporated society, there springs into being a fourth person, a new subject of legal rights quite distinct from the three individuals, viz. the collegium, the corpus as such. This invisible fourth person is the juristic person: a corporate person, created by means of organization and unaffected by the change of its members, a person moreover of far greater strength than any single 'natural' person.

L. 85 D. de V. S. (50, 16) (Marcellus): Neratius Priscus tres facere existimat collegium, et hoc magis sequendum est.

German Civil Code, § 54: Societies which are not incorporated are governed by the rules relating to partnerships *.

[4] Pernice (*Labeo*, vol. i. p. 292) points to this fact as explaining the Roman rule.—But a corpus once duly constituted could *continue* to exist without the full quorum of three members, l. 7 § 2 D. quod cujusque univ. (3, 4).

* German Civil Code, §§ 705–740.

BOOK II

THE LAW OF PROPERTY

CHAPTER I

GENERAL PART

§ 39. *Introduction.*

We have defined a person (supra, p. 161) as a subject endowed with proprietary capacity. The law of property, which we now proceed to discuss, determines the orbit of that proprietary capacity.

There are certain rules of law which apply, in an equal degree, to all rights of property. These are: first, the rules concerning juristic acts (by which rights of property may be created, transferred or extinguished); secondly, the rules concerning the protection of rights, i. e. the law of procedure. It is with these rules, which constitute the general part of the law of property, that we are, for the present, concerned.

I. JURISTIC ACTS

§ 40. *The Conception of a Juristic Act and the Kinds thereof.*

It is a matter of observation that where a legal result is produced, such result may either be independent of the will of the person concerned (as when a right of action is barred by lapse of time) or again, it may be determined by the will of the person concerned, determined (that is to say) in one of two different senses: either in the sense that the law contravenes his will (as in the case of delicts), or in the sense that the law conforms with his will (as in the case of juristic acts). The juristic acts of private law (e. g. a contract of sale, or hire, or loan) are the means employed by a private person for the purpose of producing certain legal results affecting his proprietary position. In other words, when a private person expresses his will in such a way that the law annexes to the expression the result willed (and it is in this sense that the expression of the will is material for private law), we have a juristic act

of private law. And a juristic act may give expression and effect either to the will of one person only, or to the concordant wills of several persons. In the former case, we have a unilateral juristic act; in the latter, a bilateral juristic act, or agreement.

A will is an instance of a unilateral juristic act.

It follows from what we have said that an agreement, in the legal sense of the term, is any expression of consensus which produces a legal result.

An agreement is employed, in ordinary matters of business, either for the purpose of producing an obligation, in which case we have an obligatory agreement or 'contract'; or for the purpose of effecting an immediate change in some existing proprietary relation, e. g. for the purpose of discharging a debtor, transferring ownership or any other right, creating a usufruct or a right of pledge or what not. Agreements of the latter kind are known among German jurists as 'real agreements' ('dingliche Verträge'). The term 'real agreement' is not confined to agreements by which a real right is created, but includes any agreement affecting rights of property (in the wider sense of the term) which is not covered by the notion of an obligatory agreement. An obligatory agreement —e. g. an agreement of sale, or a promise to make over property by way of gift—is an agreement which creates *a liability*, the obligeor being bound to do some act which, when done, will alter the legal position of the parties. A real agreement, on the other hand—e. g. an agreement to transfer a claim or release a debt—has the effect of a legal *disposition*: as soon as its requirements are fulfilled, the agreement, of its own force, alters the legal position of the parties —transfers the claim, for example, or extinguishes the debt. An obligatory agreement, in short, only *promises* the intended change in the legal position of the parties; a 'real' agreement actually accomplishes it.

L. 1 § 2 D. de pactis (2, 14) (Ulpian.): Et est pactio duorum pluriumve in idem placitum et consensus.[1]

[1] In spite of the wording of this comprehensive definition, the Roman conception of a pactum is a comparatively narrow one. It is confined to such agreements as appertain to the law of obligations, whether the object be to create or, as in the case of the pactum de non petendo, to discharge an obligation. The Roman jurists do not treat agreements which lie outside the range of the law of obligations as pacta at all. (Cp. Pernice, *ZS. der Sav. St.*, vol. ix. p. 195 ff.) The conception of an agreement, in the broad modern sense of the term (and it is in this sense that we have used it

According to another classification juristic acts are divided into negotia mortis causa and negotia inter vivos. Negotia mortis causa—of which wills and donationes mortis causa are examples—are juristic acts which are intended to take effect in the event of death only ; in other words, they are dispositions which depend, by their very nature, on the death of the disposing party, especially therefore dispositions concerning the property to be left by the disposing party on his death. Juristic acts of this kind do not take absolute effect till the death of the person who performs them, and are consequently regarded, on principle, as expressing his last will; that is to say, they are revocable at any moment up to death, because they operate, as a rule, by virtue only of the *last* will of the person who performs them. All juristic acts other than negotia mortis causa are negotia inter vivos.

§ 41. *Requisites of a Juristic Act.*

Every juristic act (sale, letting, &c.) consists of an expression of the will. Thus we always have two elements: (1) the will; (2) the expression.

1. The Will.

There can be no juristic act, if the person expressing the will is legally incapable of willing (e. g. if he is a lunatic), or if, in any other way, the will is demonstrably absent.[1] This is what happens, for instance, if both parties to an agreement consent to will something different from what they express. Their expressions indicate, say, a sale, but they are agreed that the transaction shall be understood as a gift. And so in all cases, where expressions are used having reference to some juristic act, but are used in such a manner (e. g. in jest or for purposes of instruction) as clearly to negative the existence of any intention to produce a legal result. The same thing occurs where a mistake produces a result demonstrably different from that intended by the doer.

Where, however, the outward expression is unambiguous and the divergence which actually exists between such expression and the

in the text) is far wider than that developed by the Roman jurists, who were evidently influenced by the phraseology of the praetorian edict.

[1] e. g. if the vendor, by mistake, asks for too low a price, and it appears at once from the circumstances of the case that he is acting under the influence of a mistake. Cp. the *Annalen des Königl. Sächs. Oberlandesgerichts zu Dresden*, vol. ix. (1888) p. 528 ff.

inward will is not discoverable, the juristic act may, in some cases, be perfectly valid notwithstanding the divergence.[2] The leading illustration of such cases is what is known as 'mental reservation': one party to an agreement intends, without the knowledge of the other, to will something different from what he expresses. In the same way, too, an unintentional divergence between the will and its expression may be immaterial, in the sense that the person concerned is legally bound by his expression. If, for example, a man goes into a restaurant and has dinner, and subsequently declares (with perfect truth perhaps) that he thought the dinner cost less than it actually did, such unintentional discrepancy between will and expression will be legally immaterial. He will be none the less bound to pay the price usually charged at the restaurant, since his conduct in ordering the things without any reservation —purchasing them, in fact—amounted to an unambiguous expression of intention on his part to pay that price. The principle of Roman law then is that, where an expression of intention can have but one meaning, its effect is determined by that meaning, and it is only where the expression is ambiguous that the interpretation of the juristic act is determined by the real underlying intention as such.

2. The Expression.

By 'expression' (or 'declaration') we mean the communication of the will to produce some legal effect to the other party concerned in the juristic act, who is the 'addressee' of the expression or declaration. In regard to the form in which the will is expressed, juristic acts are said to be either formal or informal. They are formal, when the law prescribes the form in which the expression of the will is to be made, so that the acts in question can only be validly constituted in that particular form. A will is an instance of a formal juristic act. Informal juristic acts (and most juristic acts are informal) are those in which the will may be expressed in any form whatever, by writing or speaking, by messenger, letter, or otherwise. In some cases—where, namely, an act is done in such a way as clearly to imply an intention—an informal

[2] R. Leonhard, *Der Irrtum bei nichtigen Verträgen*, 1882; Hartmann, in *Jhering's Jahrbücher f. Dogmatik*, vol. xx. p. 1 ff., and in the *Archiv für d. civilistische Praxis*, vol. lxxii. p. 161 ff. For a different view, see Eisele, *Jhering's Jahrbücher*, vol. xxv. p. 414 ff.; Enneccerus, *Das Rechtsgeschäft* (1888), p. 107 ff.

juristic act may even be constituted without any proper act of communication at all, merely by a so-called tacit expression of the will. All that is required in informal acts is that the will shall be expressed in some manner or other.

L. 3 D. de reb. dub. (34, 5) (PAULUS): In ambiguo sermone non utrumque dicimus, sed id dumtaxat quod volumus. Itaque, qui aliud dicit quam vult neque id dicit quod vox significat, quia non vult, neque id quod vult, quia id non loquitur.

L. 9 pr. D. de her. inst. (28, 5) (ULPIAN.): Quotiens volens alium heredem scribere alium scripserit in corpore hominis errans, veluti 'frater meus', 'patronus meus', placet neque eum heredem esse qui scriptus est, quoniam voluntate deficitur, neque eum quem voluit, quoniam scriptus non est.

L. 57 D. de O. et A. (44, 7) (POMPONIUS): In omnibus negotiis contrahendis, sive bona fide sint sive non sint, si error aliquis intervenit, ut aliud sentiat puta qui emit aut qui conducit, aliud qui cum his contrahit, nihil valet quod acti sit.

3. Nullity of a Juristic Act.

Though the facts are sufficient to constitute a juristic act, the act performed is nevertheless null and void if it is either immoral or illegal. An immoral juristic act, such as a promise to pay a reward for an immoral service, is null and void in any event. An illegal juristic act is void if (as must be assumed primâ facie to be the case) it is the intention of the law that the prohibited act shall be null and void. Thus, if a law absolutely prohibits certain marriages, a marriage contracted in contravention of the law is a nullity. The Romans called a law of this kind 'lex perfecta'. But the law-giver may confine himself to visiting the prohibited act with legal disadvantages of another kind, while leaving the validity of the act untouched. That is the case, for example, with a law imposing a merely temporary prohibition on certain marriages. The Romans called a law of this kind 'lex imperfecta'. In either case the juristic act is prohibited, but whereas a lex perfecta is imperative, and is concerned with the validity of the act, a lex imperfecta is only regulative, and is concerned with the effect of the act.

§ 42. *Motive, as affecting Juristic Acts.*

The general rule is that the motives from which a juristic act proceeds are immaterial, as far as the legal effect of the act is

concerned. It is therefore, as a rule, a matter of indifference whether a person has gained his object by the juristic act or not. If, for example, he buys a book, thinking it deals with one thing, whereas it really deals with another, the sale is nevertheless perfectly good. His motive is immaterial. Falsa causa non nocet.

Such is the general rule. There are nevertheless some exceptional cases where the motive is material in the eye of the law. These are the four cases of metus, dolus, error in substantia, and donatio.

I. Metus.

Metus occurs when a person is forced to conclude a juristic act under the influence of fear arising from a threat. The threat is called vis compulsiva, and is distinguished in this sense from vis absoluta, or sheer physical force. The object of the threat is to secure the conclusion of the act, e.g. a transfer of ownership or a promise to pay money. Roman civil law, in such cases, upheld the transaction as perfectly valid and binding, but the praetor supplied the person intimidated with the means of cancelling, by process of law, the effects of the act thus forced upon him. These means were: first, the actio quod metus causa, an action for the recovery of property available against any one who was actually the richer, at the time, by the transaction in question; secondly, the exceptio quod metus causa, a special defence allowed to a person who was sued on an act he had performed under the influence of fear. Metus was, thirdly, a 'justa causa' for the granting of 'in integrum restitutio' (infra, p. 296).

L. 1 pr. D. quod met. c. (4, 2): Ait praetor: QUOD METUS CAUSA GESTUM ERIT, RATUM NON HABEBO.

L. 14 § 3 D. eod. (ULPIAN.): In hac actione non quaeritur utrum is qui convenitur an alius metum fecit: sufficit enim hoc docere metum sibi illatum vel vim, et ex hac re eum qui convenitur, etsi crimine caret, lucrum tamen sensisse.

II. Dolus.

Dolus occurs when one party to an agreement is induced to conclude a juristic act by means of the deliberate deception practised on him by the other. One party, in short, is defrauded by the other. Here again the civil law upheld the transaction as perfectly valid and binding, but the praetor granted certain legal

remedies against the fraudulent party by means of which the civil law effects of the transaction were nullified. These remedies were, first, the actio doli and, secondly, the exceptio doli. The object of the actio doli (which was merely a subsidiary remedy, applicable only if there were no other kind of legal redress) was to obtain compensation for all loss resulting from the juristic act, which might involve, in certain circumstances, a rescission of the whole transaction. It only lay against the defrauding party himself, or his heir, but not against third parties who had profited by the transaction. The exceptio doli was a special defence to an action brought by the defrauding party, or his legal successor, on the transaction in question. There was also, thirdly, an 'in integrum restitutio propter dolum' (infra, p. 296).

L. 1 § 1 D. de dolo (4, 3): Verba autem edicti talia sunt: QUAE DOLO MALO FACTA ESSE DICENTUR, SI DE HIS REBUS ALIA ACTIO NON ERIT ET JUSTA CAUSA ESSE VIDEBITUR, JUDICIUM DABO.

III. Error in Substantia.

'Error in substantia' is a mistake concerning some essential quality of the subject-matter of the agreement, i. e. concerning some quality which places the article for commercial purposes in a different category of merchandise. Thus it would be an error in substantia, if I were to mistake a gilt vessel for one of solid gold, vinegar for wine, or a female slave for a male one. In all these cases the subject-matter of the agreement is specifically indicated. Both parties mean precisely the same individual thing. There is, in other words, complete 'consensus in corpore'. Thus error in substantia is the very opposite of error in corpore, for the former presupposes complete consensus as to the subject-matter of the agreement, whereas in the latter there can be no consensus, because each party is thinking of a different subject-matter. In the case of an error in substantia, one party can be proved to have believed the subject-matter to possess some essential quality which in truth it does not possess. There need not be any fraud on the part of the other; he may be labouring under precisely the same mistake. The mistake, such as it is, is a mistake of motive, a mistake which produces the necessary will, the consensus—in a word, the juristic act—in precisely the same manner as metus and dolus in the previous instances. The juristic act is complete, and on principle,

again, perfectly valid and binding. Falsa causa non nocet. In certain exceptional cases however, where there is a bilateral contract, a person who, under the influence of an excusable error in substantia, becomes a party to such a contract (e. g. a sale), may impeach the transaction on the ground of such error in substantia. Thus in the great majority of juristic acts (traditio, pledge, promise of a gift, depositum, commodatum, &c.) Roman law treats an error in substantia (like any other motive) as immaterial, so far as the legal validity of the act is concerned. Its legal relevancy is confined to obligatory transactions with promises of mutual consideration, such as sale, or letting and hiring. And when we say that error in substantia is material in such cases, we do not mean that the entire transaction in question is void, nor again that it can be impeached by any special legal remedy. What we mean is merely that, in virtue of the bona fides which governs all such transactions, an error in substantia must necessarily modify the effects which they produce, and modify them, not merely according to the praetorian law, but ipso jure, i. e. according to the civil law. Where I clearly intend to purchase wine, but through some excusable error purchase poison, it would be inconsistent with the requirements of good faith which govern the contract of sale, if I were simply condemned to pay the price, and were debarred from demanding a rescission of the sale,—unless indeed there are particular circumstances which make such a treatment of the case unfairly prejudicial to the vendor. For it is of the essence of every contract of sale, as well as of all other transactions which generate bilateral obligations (§ 76), that the parties are not simply bound to perform what they actually promised, but are merely obliged to act up to the requirements (the full requirements, however) of good faith and honesty in the mutual dealings between man and man.[1]

IV. Donatio.

A gift (donatio) is a transaction whereby one person, from motives of liberality, i. e. with a view to enriching another person,

[1] Cp. Zitelmann, *Irrtum und Rechtsgeschäft* (1879), p. 560 ff.—The view embodied in the text differs from the prevalent doctrine, according to which an error in substantia renders bilateral contracts totally void in Roman law, so that, as far as such contracts are concerned, there is (on this view) no difference in law between error in substantia (which begets the consensus) and error in corpore (which makes consensus impossible).

makes over to that other person some property or benefit. A gift may be effected either by a transfer of property (dando) or by an obligatory promise (promittendo), or by a discharge from a debt, i. e. by a contract of release (liberando). The special characteristic of a gift is the motive which underlies it, the 'animus donandi', or motive of liberality. In early Roman law, the power to make gifts had been subjected to certain restrictions by the lex Cincia (204 B. C.) which prohibited gifts exceeding a specified maximum, unless they were made to certain exceptae personae. In Justinian's law transactions which have for their object the making of a gift are, on account of this motive, governed by the following rules:

1. Gifts between husband and wife are void (§ 94 *ad fin.*).

2. Gifts exceeding a certain maximum (fixed by Justinian at 500 solidi, about £234) are void to the extent of such excess, unless the donor registers the gift in court (insinuatio), thereby formally manifesting his intention of bounty.

3. Gifts are revocable on the ground of gross ingratitude on the part of the donee, e. g. if he compasses the donor's death, or scandalously libels him.

A donatio mortis causa is a gift conditional on the donee's surviving the donor. In regard to the rules just stated as well as in some other respects, donationes mortis causa are not governed by the law applicable to donationes, but by the law of legacies (§ 118).

L. 1 pr. D. de donat. (39, 5) (JULIAN.): Donationes complures sunt. Dat aliquis ea mente ut statim velit accipientis fieri, nec ullo casu ad se reverti, et propter nullam aliam causam facit quam ut liberalitatem et munificentiam exerceat: haec proprie donatio appellatur.

§ 1 I. de donat. (2, 7): Mortis causa donatio est quae propter mortis fit suspicionem: cum quis ita donat ut, si quid humanitus ei contigisset, haberet is qui accepit; sin autem supervixisset qui donavit, reciperet, vel si eum donationis poenituisset, aut prior decesserit is cui donatum sit. Hae mortis causa donationes ad exemplum legatorum redactae sunt per omnia; a nobis constitutum est ut per omnia fere legatis connumeretur . . . Et in summa, mortis causa donatio est, cum magis se quis velit habere quam eum cui donatur, magisque eum cui donat quam heredem suum.

§ 43. *The Qualifications of a Juristic Act.*

The normal effects of a juristic act may be modified by a collateral agreement between the parties to the act. The modifications which the parties thus agree to engraft on the act are what we call the 'qualifications' of a juristic act. Of such qualifications three are the most important: condicio, dies, modus.

I. Condicio.

A condition is an uncertain future event on the occurrence of which the parties agree to make the effect of the transaction dependent. A condition is 'suspensive' when the commencement, and 'resolutive' when the termination, of the operation of the act is made to depend on its occurrence. On the fulfilment of a suspensive condition, the juristic act produces ipso jure its normal legal results, effecting a transfer of ownership, creating a liability, &c., as the case may be. And, conversely, on the happening of a resolutive condition the normal effects of the act cease ipso jure [1].

If A makes over property by way of gift to B subject to a suspensive condition—subject, for example, to B's passing an examination—B (the donee) becomes owner of the property ipso jure the moment the condition is fulfilled; till then, A (the donor) remains owner. If the condition was meant to be resolutive, i. e. if the intention was that B should be owner, unless he failed in his examination, the ownership would vest in B at once, but on the fulfilment of the resolutive condition (i. e. on B's failure to pass), it would divest again and revert ipso jure to the donor. Until, therefore, the condition is fulfilled, the ownership vests, in the former case, in the donor; in the latter case, in the donee; but in either case it is a mere interim ownership, a defeasible ownership (dominium revocabile), that is, an ownership which is liable to divest and revert to another person. If in the meanwhile the interim owner creates any rights in respect of the property—if he, for example, mortgages or alienates it—such rights are also defeasible; that is, they cease to exist the moment the condition is fulfilled: resoluto jure dantis resolvitur etiam jus accipientis. To account for such a result by

[1] In the *Archiv für bürgerliches Recht*, vol. xv. (1898) p. 1 ff., there is an important article by A. Kohler ('Die Resolutivbedingung'), in which the author traces the development of the resolutive condition in Roman law and shows within what narrow limits its practical application was confined even in the Corpus juris of Justinian.

ascribing it to the 'retroactive effect' of the condition is unsatisfactory. What really happens is simply this: the annexing of a condition to a right has what may be described as a *real* effect on the right; that is to say, it stamps the right with a particular character not only as between the original parties, but as against any one who acquires it; the right has, as it were, a burden attached to it, and whoever becomes entitled to it, must take it, in that sense, *cum onere*.

The following are not conditions in the true sense of the word: 'condiciones juris' or 'condiciones tacitae' (which are only terms for describing the requirements necessarily presupposed by the essential nature of a juristic act; the death of the testator before the heir, for example, is a 'condicio juris' of the institution's taking effect); 'condiciones in praesens vel in praeteritum relatae,' impossible conditions, and necessary conditions. The peculiar characteristic of conditional transactions—viz. that the parties, by their own act, make the contemplated legal result dependent on an event which is both future and uncertain—is not to be found in the case of any of the so-called conditions just mentioned, and accordingly the rules relating to conditions (in the true sense) have no application. Where, for example, a condicio juris is not forthcoming, the rules to be applied are those dealing with the failure of an essential requirement of the particular legal relationship in question. An impossible condition renders a negotium inter vivos void; if annexed to a negotium mortis causa (supra, p. 206), it is taken in Roman law pro non scripto. An immoral condition (condicio turpis) is treated like an impossible condition.

§ 4 I. de V. O. (3, 15): Sub condicione stipulatio fit, cum in aliquem casum differtur obligatio, ut, si aliquid factum fuerit vel non fuerit, stipulatio committatur, veluti: SI TITIUS CONSUL FUERIT FACTUS, QUINQUE AUREOS DARE SPONDES?

§ 6 eod.: Condiciones quae ad praeteritum vel ad praesens tempus referuntur aut statim infirmant obligationem, aut omnino non differunt, veluti: SI TITIUS CONSUL FUIT—vel: SI MAEVIUS VIVIT, DARE SPONDES?

L. 9 § 1 D. de novat. (46, 2) (ULPIAN.): Qui sub condicione stipulatur quae omnimodo exstatura est, pure videtur stipulari.

II. Dies.

'Dies' is a future event which is certain to happen, and on the

occurrence of which the operation of the juristic act is either to commence (dies a quo) or to terminate (dies ad quem).

Dies incertus quando is the term applied when it is uncertain at what particular time the dies will occur, as where the liability of a surety is to cease on the death of the debtor. If there is uncertainty as to whether the dies will ever occur at all—as where A promises to give B £10 on the day when he passes his examination —this, though called 'dies incertus an', is not properly a dies at all, but a condition.

§ 2 I. de V. O. (3, 15): Id autem quod in diem stipulamur statim quidem debetur, sed peti prius quam dies veniat non potest.

III. Modus.

'Modus' (in the technical sense) is a qualification added to a gift or testamentary disposition, whereby the person benefited is required and bound to devote the property he receives, or the value thereof, in whole or in part, to a specified purpose.[2] Where a right is conveyed sub modo—as where A makes B a gift of property, requiring him at the same time to give £10 to C—the effect is not the same as in the case of a condition. The modus has no 'real' effect on the right conveyed; that is to say, it does not impress the right with a particular character as against any one that acquires it; it does not encumber the right in the sense of making it defeasible. The recipient (B) becomes absolute owner at once, subject only to a personal obligation to perform the act required of him. But even if he does not perform it, his title as owner remains unaffected, though the non-performance renders him liable to an action in personam. And if he alienates or mortgages the property, the alienee or mortgagee will take it free from any duty in respect of the modus. The effect of a modus, unlike that of a condition, is merely to impose an obligation on the person who takes the property sub modo.

L. 17 § 4 D. de cond et. dem. (35, 1) (GAJUS): Quod si cui in hoc legatum sit ut ex eo aliquid faceret, veluti monumentum testatori, vel opus, aut epulum municipibus faceret, vel ex eo ut partem alii restitueret, sub modo legatum videtur.

L. 80 eod. (SCAEVOLA): . . . nec enim parem dicemus eum cui ita datum sit: SI MONUMENTUM FECERIT, et eum cui datum est: UT MONUMENTUM FACIAT.

[2] Cp. Pernice, *Labeo*, vol. iii. part 1: Auflage u. Zweckbestimmung (1892).

§ 44. *Capacity of Action.*

'Capacity of action', in the wider sense, is the capacity to act in such a manner as to produce a legal result. As far as the law is concerned, only the acts of persons legally capable of acting need be taken into account as 'acts', i. e. as manifestations of *a will*, whether lawful or unlawful.

Capacity of action, in the narrower sense (and it is in this sense that the conception is of special importance in private law), means the capacity to perform acts of a particular kind, the capacity, namely, to conclude juristic acts. In the German Civil Code this capacity to conclude juristic acts is called 'Geschäftsfähigkeit'. There are three degrees of such capacity: total absence of capacity, partial absence of capacity, full capacity.

I. The following persons are incapacitated from all juristic acts:

(*a*) the 'infans', or child who has not yet completed its seventh year;

(*b*) the 'furiosus', or person of unsound mind.

II. The following persons are in Roman law incapacitated from some juristic acts, but capable of others:

(*a*) the 'impubes', or child who has completed its seventh, but has not yet completed (if a boy) his fourteenth or (if a girl) her twelfth year;

(*b*) the 'prodigus', or prodigal who has been placed under the control of a curator.

In the early Roman law women were also capable of some juristic acts only (§ 103, III).

The legal position of persons of the second class is as follows. They are capable of such juristic acts as result in an improvement of their proprietary position, but they are incapable of juristic acts which operate to alienate property or impose a liability. If therefore a person of imperfect capacity enters on a transaction which operates both to confer a right and to impose an obligation, he acquires the right, but cannot himself be sued on the transaction. Thus, if he contracts a loan, he becomes owner of the coins given him under the loan, but cannot be sued on the loan, as such. All he can be compelled by action to do—and in this respect he is in just the same position as a person who is completely incapacitated—

is to restore the amount by which he is still the richer in consequence of the transaction (§ 83, I). If the transaction is one involving a performance on one side and a counter-performance on the other (e. g. a sale), he is entitled, according to Roman law, to exact performance from the other party without being himself compellable by action to do his part. Hence such transactions are called 'negotia claudicantia'.

A guardian may act in place of a person of imperfect capacity. Or, if the latter be an impubes, he (the impubes) may conclude acts which operate to alienate property or impose a liability himself, provided he is assisted by the presence of his guardian (tutoris auctoritatis interpositio). Cp. § 103.

pr. I. de auct. tut. (1, 21): Auctoritas autem tutoris in quibusdam causis necessaria pupillis est, in quibusdam non est necessaria: ut ecce, si quid dari sibi stipuletur, non est necessaria tutoris auctoritas; quod si aliis pupilli promittant, necessaria est. Namque placuit meliorem quidem suam condicionem licere eis facere etiam sine tutoris auctoritate, deteriorem vero non aliter quam tutore auctore. Unde in his causis ex quibus mutuae obligationes nascuntur, in emptionibus venditionibus, locationibus conductionibus, mandatis, depositis, si tutoris auctoritas non interveniat, ipsi quidem qui cum his contrahunt, obligantur, at invicem pupilli non obligantur.

§ 2 eod.: Tutor autem statim in ipso negotio praesens debet auctor fieri, si hoc pupillo prodesse existimaverit; post tempus vero aut per epistulam interposita auctoritas nihil agit.

L. 6 D. de V. O. (45, 1) (Ulpian.): Is cui bonis interdictum est stipulando sibi adquirit, tradere vero non potest vel promittendo obligari: et ideo nec fidejussor pro eo intervenire poterit, sicut nec pro furioso.

III. All persons not specified in classes (i) and (ii) have full legal capacity for all juristic acts, including therefore the capacity to incur contractual liabilities of their own. According to Roman law, then, minors who are above the age of puberty, but under twenty-five years (puberes minores xxv annis), enjoy full capacity. Such minors are, however, allowed to apply for a curator, and once a curator is appointed, the 'minor curatorem habens' ceases, in spite of his full capacity of action, to have any power *to dispose* of his property. He is deprived of the right to manage his own property, because the management of it has been transferred to his curator. True, he can, by his own will, conclude juristic acts of any kind, including such as effect an alienation of property or

impose a liability; he does not require any auctoritatis interpositio, any present assistance from his guardian. Unless, however, the curator gives his sanction (whether in praesenti, before, or after the transaction), all such acts of the minor as purport to alienate property or impose a liability, are nugatory as far as any effect on his property is concerned. If, instead of procuring the consent of the curator, the minor himself ratifies his act after attaining majority, the act is also binding. Wherever incapacity of *disposition* is concerned, it is the effect of the juristic act that comes into question; wherever, on the other hand, incapacity of *action* is concerned, it is the existence of the act that comes into question.

In the course of the development of German law the notion of pubertas as marking a distinctive age for legal purposes was abandoned, and the special rules of Roman law concerning minores puberes ceased therefore to be recognized. Accordingly the German Civil Code (§ 106, and cp. § 107, cited below) assigns a limited capacity for juristic acts to all minors who have completed their seventh year (infantia majores), and the same limited capacity is assigned by § 114 of the Code to persons placed under guardianship by reason of imbecility of mind, prodigality, or dipsomania.

pr. I. de curat. (1, 23): Masculi puberes et feminae viripotentes usque ad vicesimum quintum annum completum curatores accipiunt.

German Civil Code, § 107: A minor (who has completed his seventh year) cannot make a valid declaration of intention without the consent of his statutory representative *, unless the declaration is of such a nature as to confer exclusively a right or benefit on the minor.

From capacity for juristic acts we must distinguish two other capacities, viz. (1) proprietary capacity; (2) delictual capacity.

(1) Proprietary capacity, which, as we have seen (§ 30), is the prime characteristic of a person within the meaning of private law, is the capacity to hold property, the word property being taken in its widest sense as including both rights and debts. Proprietary capacity, in other words, means both the capacity to acquire rights and the capacity to incur liabilities. An infans may, like others, acquire rights and incur liabilities, e. g. by the act of his guardian. By capacity of action, on the other hand, we mean the capacity to

* As to 'statutory representative', v. infra, p. 220.

acquire rights and incur liabilities by one's own act, i. e. by a declaration of one's own will. An infans has proprietary capacity because he is a person, but he has no capacity of action.

(2) Delictual capacity is the capacity to incur a liability for unlawful acts. Like the capacity for juristic acts it is a species of capacity of action in the wider sense of that term, but it is not governed by precisely the same rules as the capacity for juristic acts. A person who is incapacitated from all acts, such as an infans or a furiosus, is also incapable of incurring any delictual liability. But a person whose capacity for juristic acts is limited may, according to Roman law, become liable on delicts, if he appears to be doli capax (e. g. the prodigus, the pubertati proximus). Thus delictual capacity and complete capacity for juristic acts are independent of one another. The essence of the latter capacity consists mainly in the ability to incur liabilities by means of juristic acts (agreements).

§ 45. *Representation.*

There are many juristic acts which a person may be bound or willing to conclude, but which he is unable to conclude himself. A lunatic cannot buy bread for himself even though he has money enough to pay for it. A rule of law prevents his concluding the act. Nor, again, is it practicable for the master to go to market every day and purchase the daily provisions himself. The conclusion of the juristic act is, in this case, prevented by physical reasons.

If I desire to conclude a juristic act on my own behalf, but am prevented by purely physical reasons, I may frequently avail myself of the services of a messenger. The messenger fulfils precisely the same purpose as a letter, the purpose, namely, of overcoming the external obstacle of distance. He relieves the sender of the journey, but it is the sender who concludes the juristic act. The messenger is merely the instrument by which the sender expresses *his* will, by which, that is, the sender concludes the juristic act. A messenger is a person who conveys the expression of another person's will, the will, namely, of the person who sends him. Suppose, however, that in employing another to do business for me, I have no intention of concluding the transaction myself. In that case, I shall give the other person authority to act on my behalf, to act in my name. If I own a business, I shall appoint a manager to act for me in

the shop; if I am an innkeeper, I shall appoint a waiter to attend to the guests in my place. My intention is that the negotiations conducted with the person whom I have authorized to act in my stead, shall decide the result, and shall be regarded in the same way as though they had been carried on by myself on my own behalf. The business of the authorized representative is not merely to save me a journey, but to conclude the juristic act for me, to decide as to the will to be expressed, and then to express that will and thereby conclude the juristic act. Therein lies the essence of representation. A messenger is merely an instrument by which I express *my* will. The expression is mine; the messenger expresses no will whatever. But the will expressed by a representative—the will to conclude a juristic act in my stead—is *his* will, and his alone. I express no will whatever. A representative, then, is a person who concludes a juristic act by the expression of his own will, but with the intention that the act thus concluded shall have the same effect as though it had been concluded, not by him, but by another. Representation is the conclusion of a juristic act by one person with the intention that it shall operate directly for another person; in short, the conclusion of a juristic act by one person *in the name of* another.

It is obvious that a mere messenger would be of little use to a person who is himself legally incapable of concluding juristic acts (e. g. a lunatic, infans, impubes). Such a person must therefore necessarily act through a representative.

Representation thus occurs in two classes of cases: first, in cases where a person is prevented by law from acting himself, so that representation becomes a matter of legal necessity; secondly, in cases where a person is prevented merely by physical reasons from acting himself, where therefore representation is due to the voluntary act of the person represented. The former kind of representation has its type in the representation of a ward by his guardian and may accordingly be called 'tutorial representation'. The other kind of representation we will call 'procuratorial representation', or 'agency' simply. The German Civil Code speaks in the first case of representation by a 'statutory representative' ('gesetzlicher Vertreter'), in the second case of representation by an 'authorized agent' ('Bevollmächtigter').

Roman law was very slow to recognize the idea of representation, and the sphere within which it was applied remained throughout a

restricted one.[1] The juristic acts of the early civil law operated entirely by virtue of their form. The rights and duties to which they gave rise accrued to the person who carried out the form, and to no one else. The mere intention of that person that the form should operate for or against another person—the person represented—had no effect whatever. To the early Roman law (as to the early German law) it seemed inconceivable that a person should acquire rights or incur liabilities by means of a form to which he had not been a party. This rule was never departed from in regard to the negotia juris civilis (which included not only mancipatio and in jure cessio, but also stipulatio), so that no one could acquire rights or incur liabilities under such a negotium unless he had been a party to the act, i. e. had participated in the form. As regards slaves and filiifamilias it is true that whatever they acquired, they acquired by the necessary operation of law, by virtue of the potestas, for their superior. But the civil law steadily refused to admit that rights could be acquired through a free representative, in other words, by the mere intention of one person to act on behalf of another. Per liberam personam nobis adquiri nihil potest (cp. L. 126 § 2 D. 45, 1; L. 1. C. 4, 27). It was not till the jus gentium began to permeate the Roman jus civile that the door was opened to the principle of free representation, at any rate within the sphere of the law of things. During the Empire it came to be recognized that possession and such other rights as, according to the jus gentium were acquired through the medium of possession, could be acquired through a representative, the most important consequence being that ownership in a thing could now be acquired by the traditio of the thing to an authorized representative—traditio being, of course, a negotium juris gentium. Thus anything acquired by a procurator (i. e. a freely chosen representative) in the name of his principal, or by a guardian in the name of his ward, passed directly into the ownership of the principal or ward. As regards contracts, however, the rule remained unaltered; that is to say, it continued to be held that contractual rights and liabilities could only accrue to the contracting party himself, and that contracts could not be validly

[1] As to this question compare Mitteis, *Die Lehre von der Stellvertretung nach römischem Recht* (1885), p. 9 ff., and in the *ZS. d. Sav. St.*, vol. xxi. p. 200 ff.; Lenel, in *Jhering's Jahrbücher*, vol. xxxvi. p. 80 ff.; Schlossmann, *Die Lehre von der Stellvertretung, insbesondere bei obligatorischen Verträgen*, vol. ii. (1902) p. 153 ff.

concluded in the name of a third party.[2] This rule constitutes a most important point of difference between Roman and modern law.

In modern systems of law both forms of representation—that which is necessitated by the law itself and that which is due to the voluntary act of a party—are, on principle, admissible in all transactions of private law. The juristic act is, in such cases, concluded by the agent, acting on behalf of another; in other words, as far as its conclusion is concerned (i. e. as far as the act of the will is concerned by means of which it comes into existence), the juristic act is the act of the agent. But as far as its effects are concerned—and in modern law this is the universal rule—the act operates to the advantage or disadvantage, not of the agent, but of the principal, the 'dominus negotii'. In a word, the act is, in point of legal effect, the act of the principal. The relevant provisions of the German Civil Code are, of course, based on these modern ideas of representation, the principle adopted being that of 'direct representation', according to which the acts of the representative operate to confer rights and impose duties directly on the principal.

The principles of representation have no application, unless the circumstances are such[3] as to enable the party with whom the agreement is made to know that the other is merely acting in a representative capacity. It is therefore only where the representative (whether guardian or procurator) acts as such, only, that is, where the representative expressly avows himself the agent of a third party who is the person really concerned in the transaction (the dominus negotii), or else where the circumstances themselves show clearly enough that he must be acting as an agent,—only then do the rights and liabilities under the transaction accrue, not to the

[2] Within the sphere of the law of contracts there was no pressing necessity for a fuller development of the principles of representation, because the praetor had met the practical requirements of business, as early as the close of the Republic, by the introduction of the actio exercitoria and the actio institoria, two of the actions (the so-called actiones adjecticiae qualitatis) by which the dominus could be sued on a contract concluded by his representative (infra, § 88). The principle of the civil law was accordingly maintained that the liabilities under a contract concluded by a representative—including even an informal contract belonging to the jus gentium—should attach in all cases to the representative himself; Mitteis, *op. cit.* p. 23. This rule applied to a guardian just as much as to a procurator; cp. l. 26 § 3 C. de adm. tut. (5, 37). (The author has to thank Professor Regelsberger for drawing his attention to this passage.)

[3] So far, of course, as they operate at all; in Roman law, therefore, subject always to the limitations indicated above.

representative, but to the dominus negotii. The transaction must, in other words, be concluded in such a way as to show clearly that it was intended to be concluded in the name of the dominus negotii, as would be the case, for example, with a contract made by a waiter in an inn, or by an assistant in a shop. The principles of representation have, therefore, no application except in those cases where the principal is *disclosed*, i. e. in those cases where the other party knows, or might reasonably know, that the person he is dealing with is merely a representative.

On the other hand, where a person (whether guardian or another), though really acting on behalf of (i. e. on account of) a principal, does nothing to show that he is so acting, but purports to be acting suo nomine, leaving his principal undisclosed—in such a case there is legally no agency at all, and neither in Roman nor in modern law would the principles of representation come into play. If an agent leaves his principal undisclosed—as where a friend buys stamps for me at the post office—the effects of the act he concludes operate to the advantage or otherwise of himself, and not of the dominus negotii. A second juristic act is necessary for the purpose of assigning the effects of the first (e. g. the acquisition of ownership) to the dominus negotii. Secret representation is, therefore, no true representation at all.

Again, what is called 'involuntary representation', i. e. that form of representation under which the acquisitions of the slave or filius-familias pass by the necessary operation of law to the dominus and paterfamilias respectively—it has disappeared from modern systems of law—is, strictly speaking, no representation at all (supra, pp. 166, 177). The juristic act concluded by a son or slave operates, on principle, to the advantage, and never to the prejudice, of the superior. Thus, on principle, the superior incurs no liability on a loan contracted by the son or slave, though he becomes owner of the money received. In other words, there is but a partial operation of the principles of representation. It is only on certain other specific conditions that the superior becomes subject to the liabilities, as he is entitled to the benefits, arising from a transaction concluded by his son or slave (§ 88). And it is moreover to be observed that acquisitions of a son or slave pass by operation of law to the father or dominus quite regardless of the fact whether the former were acting in their own name or in that of their superior, or again

whether they were authorized to act or not. The rules on representation can have no application to a relationship of that kind.

II. THE PROTECTION OF RIGHTS (LAW OF PROCEDURE)

§ 46. *Introduction.*

No man need submit to being forcibly and without authority deprived of what belongs to him. In repelling an unlawful attack on his property, he is merely protecting his right by his own force. This kind of force, or, as it may be called, self-defence is permissible: vim vi repellere licet. Self-defence involves, in fact, the exercise of a right—a forcible exercise, it is true, but still the exercise of *a right* —and is therefore lawful: qui jure suo utitur, neminem laedit.

But it is a different matter, if the violation of the right is past and complete. It is then not a question of preventing the violation of a right, but of redressing a violation that has already taken place and of coercing the will of an opponent who is in actual possession; in a word, it is a question of *executing* the law. In this case private force, or self-*help*, is not allowable. To attempt to obtain redress by means of your own strength, would be, not as in the first case, to exercise, but to transgress, the private right which has been infringed, because private law only confers rights of dominion over things, or—in the case of family rights—over persons in a condition of partial dependence (supra, pp. 25, 158), and never confers any direct power over the free will of an independent person. To coerce a free person offering resistance to the law, in other words, to execute the law, is, in classical Roman law as well as in modern law, reserved for the State. Once a right has been definitely infringed, there is only one way of securing an execution of the law, and that is by invoking the power of the State, in short, by bringing an action at law.

Obligatory rights have this peculiarity that, prior to the fulfilment of the obligation, the creditor can never be said to be exercising his right, and that his right is never, in the first instance, available against a thing, but always only against the person of his debtor. It follows that, if a creditor seeks to obtain satisfaction by force, his act can never be one of legitimate self-defence, but must

necessarily be one of self-help. Every person, therefore, who claims an obligatory right and desires to obtain satisfaction of his right by compulsory means must, on principle, seek his remedy by an action at law.

Self-help, which we may now define as the unauthorized taking of the law into one's own hands, was rendered penal in Roman law by a decree of Marcus Aurelius, the 'decretum divi Marci'. The decree applied to self-help as such, and not only to acts of self-help which infringed the rights of another and might (as already pointed out) be met, if necessary, by force on the part of the person aggrieved. The punishment consisted in the delinquent's forfeiting the right he had sought to assert in a forcible and unauthorized manner; and if he never possessed that right, he was compelled to restore double the value of the property he had forcibly appropriated.

There are, however, some exceptions to the rule forbidding self-help. Self-help is considered lawful—and was so considered even in Roman law—in cases of emergency where, as a matter of fact, the judicial protection is inadequate, and where, consequently, self-help supplies the only means of preventing irreparable damage; for instance, as against a debtor who attempts to abscond in order to defeat his creditors.

§ 47. *Roman Civil Procedure.*[1]

The fundamental characteristic of Roman civil procedure in the classical period is the division of all judicial proceedings into two sharply distinguished sections, the proceedings 'in jure' and the proceedings 'in judicio'.

The proceedings 'in jure' are the proceedings before the

[1] Keller's *Der römische Civilprocess und die Actionen* (6th edition, admirably revised by Wach, 1883) continues to hold its place as the standard work on Roman civil procedure. In quite recent times a great deal of fresh light has been thrown on the formulary procedure in consequence more particularly of the very valuable researches of M. Wlassak, *Römische Processgesetze*, 2 vols. (1888, 1891). On the same subject see Wlassak, *Die Litiscontestation im Formularprocess* (Festschrift für Windscheid), 1889; *Zur Geschichte der Cognitur* (1893). Of other modern books on civil procedure we may mention more especially the following: Bekker, *Die Actionen des römischen Privatrechts*, 2 vols. (1871, 1873); Karlowa, *Der römische Civilprocess zur Zeit der Legisactionen* (1872); Baron, *Abhandlungen aus dem röm. Civilprocess*, 3 vols. (1881, 1882, 1887); Aug. Schultze, *Privatrecht und Process in ihrer Wechselbeziehung* (1883), p. 228 ff.; O. E. Hartmann, *Der Ordo judiciorum und die Judicia extraordinaria der Römer*, erster Teil: *Über die röm. Gerichtsverfassung*, supplemented and edited by A. Ubbelohde (1886).

magistrate, that is to say, before a judicial officer, the organ and representative of the sovereign power of the State. And since the introduction of the praetorship the 'magistrate' means, as a rule, the praetor. The object of the proceedings in jure is, first, to ascertain whether the plaintiff's claim is admissible at all, i. e. whether there is any form of civil procedure by which it is enforceable; secondly, to determine the nature of such claim, and, at the same time, to fix the conditions subject to which it can be asserted. In the absence of a 'confessio in jure' (supra, p. 56), the proceedings in jure culminate in, and terminate with, the so-called litis contestatio, i. e. the formulating of the legal issue, the object of which is to supply a foundation for the judicium, and, through it, to obtain a final decision of the issue. The name litis contestatio—the 'knitting of the issue'—is due to the original practice of coupling with this stage of the proceedings a solemn appeal addressed by each party to his witnesses.[2] The granting of the litis contestatio by the

[2] Festus (*De Verborum Signific.*) says: Contestari litem dicuntur duo aut plures adversarii, quod ordinato judicio utraque pars dicere solet: testes estote. *Both* parties must appeal to witnesses (*con*testari). By this appeal they solemnly bind themselves to abide by the judicium on the issue thus formulated. Hence the notion that the carrying out of the litis contestatio creates a kind of obligation, 'judicio *contrahitur*' (Cic. *de Leg.* iii. 3; lites *contractas* judicanto: l. 3 § 11 D. 15, 1: sicut in stipulatione contrahitur cum filio, ita judicio contrahi). The litis contestatio, which commences with the appeal to the witnesses, constitutes the real 'litigare', 'agere,' or 'petere' upon the basis of which the judgement proceeds; cp. Wlassak, *Cognitur*, p. 7 ff. and infra, § 48, n. 1.—Festus' words 'ordinato judicio' have hitherto been taken to mean that the appeal to the testes did not take place till *after* the appointment (ordinare) of the judicium and, consequently, *after* the formulating of the issue, thus marking the closing act of the proceedings 'in jure'. It has however been very justly objected by Hartmann-Ubbelohde (*op. cit.* pp. 448, 449) that to suppose the appeal to have followed the act of formulating the issue is to suppose something inconsistent with the very nature of the circumstances. It has moreover been clearly established by Wlassak (*Litiscontestation*, p. 72 ff.) that the word 'ordinare' is also used in the sense of 'preparing', and more especially 'litem ordinare' in the sense of 'preparing the issue' (e. g. in the expression 'bonorum possessio litis ordinandae gratia'). 'Ordinato judicio' would accordingly mean 'after the judicium has been prepared'. Thus, as soon as it has been determined in what manner it is intended to formulate the issue—i. e. as soon as (in the older procedure) the *kind* of legis actio, and (in the later procedure) the contents of the formula have been decided on—the witnesses are appealed to and the contemplated act of formulating the issue (the litis contestatio) is solemnly performed in their presence. In the old times this was done by pronouncing the solemn words of the legis actio. In the formulary procedure it was probably done (as Wlassak, *ibid.*, has shown) by the plaintiff's delivering, or dictating, to the defendant the written formula which the praetor had approved (datio). It appears, then,

magistrate is tantamount to a decision (decretum) on his part that the claim of the plaintiff is admissible in itself and that he (the plaintiff) is entitled to have a judicium appointed forthwith for the purpose of trying his claim in due process of law.

The proceedings in jure however can never lead to a 'sententia', or judgement, in the legal sense of the term. The issue having been formulated by means of the litis contestatio, it is necessary, for the purpose of obtaining judgement, that the action should pass out of the hands of the magistrate into those of a private individual, or, in some cases, of several private individuals adjudicating collectively.[3] A sententia—in other words, a judgement, in the legal sense—can only be pronounced by a private person who, as such, is precluded from exercising any sovereign discretion, because he

that in the formulary procedure there was also a definite act by which, as in the earlier procedure, the parties themselves joined in formulating the issue in a manner agreed upon, the plaintiff, as it were, uttering, and the defendant accepting, the formula and, with it, the judicium. In the formulary procedure this act of the parties was also at the outset coupled with an appeal to the witnesses (Wlassak, *ibid.* p. 70 ff.). The formula however being written, such an appeal would obviously not have the same practical importance as it had at the time of the oral formula of the legis actio, and it consequently fell into disuse during the Empire. On Wlassak's arguments see the observations of Lenel, *ZS. d. Sav. St.*, vol. xv. p. 374 ff.; Hölder, *Die Litiscontestation des Formularprocesses* (Leipziger Dekanatsprogramm, 1903).

[3] All actions touching the liberty of a person were, during the Republic, tried by a standing college of ten sworn judges (decemviri stlitibus judicandis). Actions concerning vindicationes, especially the hereditatis vindicatio, were referred to the college of centumviri consisting of 105, and later of 180 members, who were grouped in several committees (consilia). If the praetor wished to have a matter speedily decided, he was able, by virtue of his imperium, to appoint an extraordinary court of, usually, three or five 'recuperatores', who were directed to find a verdict within a specified time. Such cases of urgency arose especially in actions concerning personal liberty (vindicatio in libertatem), the result being that the jurisdiction of the decemviri (who ceased to officiate in such actions since Augustus) was de facto displaced by the court of recuperatores. Recuperatores were also appointed in actions to which aliens were parties. Cp. Wlassak, *Röm. Processgesetze*, vol. i. p. 179, n. 12, and vol. ii. p. 318.—Like the single judges, the recuperatores (who were always appointed for the nonce) and the centumviri were, as such, private persons. Although three centumviri were selected from each of the thirty-five tribes, there is nothing to show that they were chosen by the comitia tributa. The decemviri however had, towards the close of the Republic, to be elected by the comitia tributa, so that formally they belonged to the magistratus (minores) populi Romani, a fact which, however, did not alter their position as against the litigant parties. All sworn judges whatsoever, including the decemviri, stand to the parties solely in the position of private individuals (judex privatus), and not in the position of magistrates equipped with compulsory powers; v. Pernice, *ZS. der Sav. St.*, vol. v. p. 48.

in no way represents the absolute power of the State, and who is bound, by the oath under which he is acting, to adjudicate in strict conformity with the law as already established.[4] No one but a private person can be a judex in the true sense of the term, i. e. an organ of the positive law. For every decision of a magistrate is formally (even in civil cases) a manifestation of his sovereign imperium: a decretum or an interdictum. It is, legally speaking, not a verdict, but an imperative order.[5] On the other hand, the decision of a judex, i. e. of a private person acting under oath and under an authority based, not on imperium, but on officium,—such a decision, and it alone, is a judgement, a verdict, a 'sententia', as distinguished from an order or imperative command. That is why the law of civil procedure in Rome required that the magistrate should abstain from deciding the legal issue himself, and should refer the decision to a private person who was thereby appointed judex for purposes of the action.[6] The principle of the division of all civil procedure

[4] Cp. pr. I. de off. jud. (4, 17): Superest ut de officio judicis dispiciamus, et quidem in primis illud observare debet judex, ne aliter judicet quam legibus aut constitutionibus *aut moribus* proditum est. Unlike the magistrate (supra, p. 54) the judex is absolutely bound by customary as well as other law. He is only allowed to depart from the law on the express instructions of the praetor (exceptio, actio in factum, &c.), and the responsibility for such a departure rests not on him, but on the magistrate alone. In applying customary law the judex becomes, at the same time, an unconscious instrument for developing it. Bekker, *Die Actionen*, &c., vol. ii. p. 145 ff., is right in pointing out this fact, but he formulates his statement in a misleading manner, which would lead one to suppose, quite erroneously, that the judex had *a right* to develop the positive law similar to that exercised by the magistrate.

[5] This is the reason why a magisterial decision, even in civil matters, could be annulled by the intercession of a co-ordinate or a superior magistrate, i.e. by means of a counter-order of equal imperative force (imperium). One order simply annulled the other. It was this fact that gave rise to the system of appeal as developed in the older Roman law, one magistrate being 'appealed to' to intercede against the other. The practice of appealing to the emperor, who was authorized to withdraw any suit in the empire from the ordinary courts for the purpose of bringing it before his own court, led, during the principatus, to the development of the modern system of appeals, under which (as in the old 'provocatio') the courts are ranged in a series of higher and lower instance, a higher court trying the case over again with a view to pronouncing a *new* judgement. Cp. J. Merkel, *Abhandlungen aus dem Gebiete des römischen Rechts*, Heft 2: *Über die Geschichte der classischen Appellation* (1883).

[6] As regards this statutory obligation on the magistrate to refrain from giving the decision himself and to appoint a sworn judge to deal with the matter, it should be observed that it only took effect if both parties to the action were Roman citizens and the action was tried within the first milestone from Rome, i.e. within the city proper: Wlassak, *Röm. Processgesetze*, vol. ii. pp. 338–42.

into the two stages of proceedings in jure and proceedings in judicio is the elimination of the magisterial power from the domain of private law.

The issue, then, having been admitted and formulated in jure (litis contestatio), the next step is to pass it on for trial to a private judge, or several private judges, acting under oath. The proceedings before the judex are called the proceedings 'in judicio'. The object of these proceedings is, as already stated, to obtain a decision of the legal issue by means of the judgement (sententia) of the judex. The judge's first business will be to ascertain the facts of the case and to receive such evidence as he deems necessary, after which he will proceed, on his conscience and to the best of his ability (ex animi sententia), to pronounce judgement, i.e. to give his verdict on the legal relationship submitted to him.[7]

While the procedure in judicio did not, as far as we can see, undergo any material alteration from the time of the Twelve Tables down to the end of the classical epoch, an important reform had been effected in the procedure in jure towards the close of the Republic. The system of legis actiones was superseded by the formulary procedure.

§ 48. *The Legis Actio.*

The litis contestatio, with which the proceedings in jure terminated, was, in the early Roman procedure, a solemn act of the parties. When the arguments before the magistrate had concluded and the latter was about to grant a judicium, both parties, having solemnly called upon witnesses to testify to the issue between them, proceeded in the presence of these witnesses, to formulate the issue in an unequivocal manner by means of their own formal act, using for this purpose certain fixed traditional terms (litis contestatio, supra, p. 226). The formulae to be pronounced were determined either by

[7] Judicium, in the original and literal sense of the word, means the court (the court of the sworn judge, namely) which was entrusted with the *decision* of the matter at issue: Wlassak, *Röm. Processgesetze*, vol. ii. pp. 53, 54. The traditional practice of describing the proceedings before this court – that is, before the private individual acting under oath—as the proceedings in judicio is thus justified, though Wlassak has shown (*loc. cit.* pp. 26 ff., 56 ff.) that in our authorities the term judicium means the entire action, including the proceedings in jure and more particularly the litis contestatio, the idea being that, if and as soon as the litis contestatio has taken place, the judicium is already in existence (judicium inchoatum, judicio actum est); *ibid.* pp. 29, 32.

the wording of a popular statute—the statute, namely, on which the action was based—or by old traditional custom which was regarded as possessing the same force as a statute (lex). Hence it was that the act of performing the litis contestatio, nay, even the entire procedure of which the litis contestatio was the centre and pivot, was called a 'legis actio',[1] i. e. a proceeding according to statute. And by an action, in the true, the normal, the proper sense of the term, was understood a proceeding which led to a litis contestatio of this kind, and, through it, to a judicium and the judgement of a sworn judge, as opposed to the decision of a magistrate. But such a procedure could be called a 'legis actio' in yet another sense, in the sense namely that not only the form of the litis contestatio, but the very right of the party to claim a judicium in any particular case on the ground of the litis contestatio, was determined by a lex, or by custom having the force of lex. The Roman actio, in other words, represents a right of the plaintiff, not only as against the defendant, but also as against the magistrate, a right, namely, to have a judicium, i.e. a right to have the judicial, as opposed to the administrative machinery, placed at his disposal, in short, a right to have a private individual appointed for the purpose of deciding by his judgement the question at issue between him and his adversary. This right to a judicium—the actio—rests in early times on lex, or custom with the force of lex. And for this reason it was called legis actio.

Of legis actiones we have five—(1) the L. A. sacramento, (2) the L. A. per judicis postulationem, (3) the L. A. per condictionem, (4) the L. A. per manus injectionem, (5) the L. A. per pignoris capionem.

I. The Legis Actio sacramento.

The ordinary and most important form of the legis actio procedure was the so-called legis actio sacramento. Both parties, with a view to the litis contestatio, solemnly affirm their legal claim. The plaintiff, for example, declares: 'ajo hanc rem meam esse ex jure Quiritium,' &c., and the defendant answers with the same formula. Thereupon both deposit a sum by way of wager, the so-called

[1] The litis contestatio itself is also called actio, as in GAJUS, iv. § 11: in actione vites nominaret. And, in a formal sense, it *is* the real legis actio, the solemn raising of the issue and opening of the legal contest in the ordinary course, coupled with an application for a judicium (supra, p. 226, note 2).

sacramentum, which amounted, according to the matter in dispute, either to 50 or 500 asses, and which each party declares shall be forfeited, if his contention proves to be false. This wager supplied the formal basis for the judicium (i. e. the formulating of the issue) and, when once entered upon, may be presumed to have, at the same time, formally established the right to a judicium (i. e. the actio) as against the magistrate. If a man challenged another to a wager (sacramentum) in reference to some legal claim primâ facie possible, he was thereby enabled not only to compel his opponent to lay a counter-wager, but also to require the magistrate to appoint a judex. This legis actio was thus, in the truest sense, a legis actio sacramento, for the judicial wager was the basis both of the decision of the judicium and of the formal title to the judicium. The private right secured its actio *by means of* the sacramentum.[2]

II. Legis Actio per judicis postulationem.

There were, however, some particular cases where the law annexed to the existence of certain facts—facts, namely, constituting contracts and delicts of a specified kind—an *immediate* actio or right to a judicium. There was no need to lay a wager (sacramentum) and incur the perils involved in such a proceeding. In order to compel the magistrate to direct a judicium, all that was required was that the plaintiff should affirm in jure the existence of the facts consti-

[2] It is probable that the compulsory force of the sacramentum as against the magistrate is based on the fact that, originally, it was a matter not merely of money against money, but of oath against oath (i. e. sacramentum, in the ordinary sense of the word). The person tendering the oath pledges, for the truth of his oath, either his own person (i. e. he consecrates himself to the gods), or only some portion of his property, which he thereby consecrates to the gods, which he, in other words, agrees shall be forfeited to the gods, if the decision goes against him. In civil proceedings, the latter kind of oath, where a man merely staked some portion of his property (the 'Vieh-Eid' of German law), was sufficient. Even it, moreover, was enough to raise a question which required to be decided by an objective judgement; was enough, in other words, to deprive the magistrate of all power to reserve the matter for his own decision (decretum), and to compel him to let a sworn judge (judex), or a body of sworn judges (e.g. the centumviri), decide it by means of a verdict, or sententia. The oath, in a word, establishes the actio, i.e. the claim to a judicium. Subsequently the oath was dropped, and the consecrated sum of money (sacramentum, in this sense) alone remained, though, as a matter of fact, the actual depositing was, in later times, dispensed with, the money being merely promised.—As to the theory that the legis actio sacramento had its origin in the practice of tendering oath and counter-oath, see H. H. Pflüger, *Die legis actio sacramento* (1898).

tuting the particular contract or delict in question, and should, on the ground of such facts, claim in solemn words to have a judex appointed. But it was indispensable that the facts of the case should tally precisely with those indicated by the verba legis, and that therefore, in setting forth these facts, the exact verba legis should be employed. Inasmuch then as, in these cases, the application for a judex immediately bound the magistrate to grant the judicium, this legis actio was called the L. A. per judicis postulationem.[3]

III. Legis Actio per condictionem.

The L. A. per judicis postulationem had been designed for the enforcement of claims in personam. Actions for the enforcement of such claims received a further development by means of the L. A. per condictionem, which was first introduced by the lex Silia for the recovery of a fixed sum of money (certa pecunia), and afterwards extended by the lex Calpurnia to claims for a certa res.[4] Whenever the plaintiff in an action in personam was able to fix his claim against the defendant precisely at some definite amount (certam pecuniam dare), or to specify a definite object the ownership of which should be conveyed to him (certam rem dare), he could, as in the L. A. per judicis postulationem, claim from the magistrate the immediate appointment of a judex. This condictio had its danger as well as its advantage. Its danger was that the

[3] It is to this legis actio per judicis postulationem that the 'legis actio de arboribus succisis', instanced by Gajus, bk. iv. § 11, refers. There seems to be no doubt that the original action, based on the Twelve Tables, really only lay for cutting *trees* and nothing else. The extension of the action to other cases, especially to the case of vites succisae, was due to the interpretatio of a later time; but even when thus extended, the words used in the litis contestatio had still to be those prescribed by the statute, viz. 'de *arboribus* succisis.' This was the source of the formalism of which Gajus speaks. For it is of course out of the question that, in speaking 'de arboribus succisis', the Twelve Tables intended, from the outset, to include vites as well. The rule then that an action should only lie de arboribus succisis, meant originally that an actio should really only lie on facts precisely corresponding to the words of the statute. In the course of the subsequent development this rule, though virtually abandoned by the admission of the actio de vitibus succisis, was nevertheless maintained by a fiction, the action being still formally brought de arboribus succisis only. The absurdities of the formalism noted by Gajus must, therefore, be considered the result of a subsequent development. The legis actio fiduciae supplies another example of the L.A. per judicis postulationem (supra, p. 62, note 14). For further cases v. Voigt, *Die zwölf Tafeln*, vol. i. p. 586 ff. On the L. A. per judicis postulationem, cp. A. Schmidt, *ZS. der Sav. St.*, vol. ii. (1881) p. 155 ff.

[4] Gaj. iv. §§ 18–20.

plaintiff, though entitled to something, was nevertheless cast in his suit, if he did not claim the precise amount due to him. Its advantage was that it applied to some cases the facts of which did not in themselves entitle a person to the judicis postulatio; nay even to cases where the civil law did not, as yet, recognize any ground of liability at all, and where the only foundation for the claim was the fact that A had been unjustly enriched at the expense of B.[5] In the L. A. per judicis postulationem the litis contestatio merely formulated the facts of the case without in any way indicating the nature of the claim deduced therefrom (legis actio in factum concepta); conversely, in the L. A. per condictionem the litis contestatio merely formulated the legal claim without mentioning the facts from which it was deduced (legis actio in jus concepta). It was an abstract action where the concrete facts, on which the claim rested, were not referred to in the litis contestatio, or solemn formulation of the issue.[6]

For cases falling under this new legis actio, the law required that the judicis postulatio should be made in a manner differing from the practice traditionally observed in the case of the L. A. per judicis postulationem. For in this latter action, the magistrate, in accordance with ancient usage, appointed the judex at once.[7] In

[5] The lex Calpurnia which extended the L.A. per condictionem to claims for a certa res, is most probably identical with the lex Calpurnia de pecuniis repetundis (of the year 149 B.C.), which was directed against the taking of money by magistrates (Pernice, *Labeo*, vol. iii. p. 233; Mommsen, *Röm. Strafrecht*, p. 708). The term 'repetere' continued to be used in later times in a technical sense in connexion with condictiones (Pernice, *op. cit.*, p. 232). It is possible that the condictio was originally only intended for the enforcement of claims founded on the fact of the Defendant's *having* the thing claimed without just cause, and was therefore distinct from the actio certae creditae pecuniae, in which the Plaintiff claimed a definite sum of money on the ground of a juristic act, such as mutuum, or stipulatio, or a literal contract. (Karlowa, *Röm. RG.*, vol. ii. p. 594 ff.; W. Stintzing, *Beiträge zur röm. Rechtsgeschichte*, 1901, pp. 7 ff., 40 ff.) The prevalent doctrine assumes that the actio certae creditae pecuniae is merely another name for the condictio certi when employed for the recovery of certa pecunia. In the Corpus juris there is certainly no trace of an actio certae creditae pecuniae distinct from condictio.

[6] Among the learned writers who have examined this subject there is considerable difference of opinion on all points of detail, which is hardly surprising in view of the scantiness of the information preserved to us. Cp. J. Baron, *Abhandlungen aus dem römischen Civilprocess*, vol. i: *Die Condictionen* (1881); Pernice, *Labeo*, vol. iii. p. 226 ff.; Rob. v. Mayr., *Die condictio des römischen Privatrechts* (1900); and supra, note 5.

[7] GAJUS, iv. § 15: Ut autem [die] XXX. judex daretur, per legem Pinariam factum est; ante eam autem legem [stat]im dabatur judex. What Gajus

the L. A. per condictionem the procedure was different. The parties agreed to reappear in jure before the praetor in thirty days for the purpose of selecting and appointing a judex (ad judicem capessendum).[8] The plaintiff at the same time gave the defendant formal notice to reappear within thirty days before the magisterial tribunal for the purpose of appointing the judicium. This notice was called 'condictio', which means literally an agreement or convention. Hence the name legis actio per condictionem. It is to be observed that the force of the qualifying words 'per condictionem' is precisely analogous to that of the words 'per judicis postulationem' in the other legis actio. In either case the plaintiff's application for a judex is directly binding on the magistrate.

IV. Legis Actio per manus injectionem.

In certain extraordinary cases the actio arises from a completed act of execution, in the same way as in the L. A. sacramento it arises from an act of affirmation.

The normal form of execution is judicial execution, i. e. the act of laying hands on one's adversary in jure in the presence of the magistrate (manus injectio).[9] It means the attachment of the

here says about the former practice of immediately appointing the judex in the L. A. sacramento, may reasonably be assumed to have been equally applicable to the L. A. per judicis postulationem.

[8] This procedure was perhaps modelled on the practice of the court of the praetor peregrinus (Pernice, *Labeo*, vol. iii. p. 233). In suits between foreigners the appointment of the judicium proceeded on the basis of an agreement of arbitration between the parties (cp. infra, § 49). That the same was the case with the L. A. per condictionem seems to be shown by the fact that, in the latter, the judex had a wider discretion as to the legal ground of liability than in the other legis actiones.

[9] Extra-judicial manus injectio is never a genuine act of execution. It means either the taking possession of an unfree person (thus, in Livy iii. 44, Claudius applies the manus injectio to Virginia, with a view to taking her to his home as a slave), or it is an act of summons. If the defendant disregarded the in jus vocatio, i. e. the solemn oral summons addressed to him by the plaintiff, the latter could always lay hands on him (manus injectio), with a view to bringing him before the court (Twelve Tables, i. 2). In some cases the plaintiff could proceed to manus injectio at once without any previous in jus vocatio. He could thus arrest e. g. a judgement-debtor (judicatus), in order to take him before the praetor for the purpose of there carrying out the judicial manus injectio; or again a 'fur manifestus', or other person who had committed a delict partaking of a criminal nature (Demelius, *ZS. für RG.*, vol. i. p. 362 ff.). But extra-judicial manus injectio of this kind, though it serves the purpose of introducing legal proceedings, is, in itself, totally immaterial as far as the course of procedure itself is concerned; it is always merely preliminary to, never productive of, an action at law. Judicial manus injectio, and it alone, can beget an *action*. Thus,

defendant for the purpose of making him the bondsman of his creditor. The party attached is disqualified from making any defence himself, because the effect of the manus injectio is to place him ipso jure in the position of a slave (servi loco).[10] A third party, however, may intervene as a vindex and counteract the effect of the 'manum injicere' by means of a 'manum depellere'. The manum depellere operates to annul the preceding manus injectio, so that the debtor is free once more and cannot be attached again for the same cause. But, on the other hand, the vindex is now bound to indemnify the creditor whose act of execution he has nullified. He must give immediate satisfaction for the debt for the recovery of which manus injectio had been employed.[11] If, however, he refuses to pay the debt on the ground that he challenges the legality of the manus injectio, the law-suit commences and the vindex, if defeated, is cast in double damages. The suit has to be decided by the ordinary procedure, a judex being appointed for the purpose. It is in this sense that manus injectio begets an actio,[12] viz. the L. A. per manus injectionem. Judicial manus injectio (i. e. the act of execution) implies a right to have any issue that may arise in the event of the claim being challenged, tried by a judicium.

Judicial manus injectio can only be used in the case of an indisputable money claim. The regular instance of such a claim

though there are several forms of manus injectio—judicial or extra-judicial manus injectio, and of the latter again several kinds—there is nevertheless but one legis actio per manus injectionem, the actio namely which springs from the judicial manus injectio, or act of execution.

[10] The fact that the manus injectio ipso jure debarred the person attached from making any defence confirms the supposition that, in the early law, the efficacy of judicial manus injectio was independent of any addictio on the part of the praetor; cp. Jhering, *Geist des röm. R.*, vol. i. p. 152; Wlassak, *Röm. Processgesetze*, vol. i. p. 96, n. 27.

[11] Cp. LIVIUS, vi. 14: (M. Manlius) centurionem nobilem militaribus factis judicatum pecuniae cum duci vidisset, medio foro cum caterva sua accurrit et manum injecit, vociferatusque de superbia Patrum ac crudelitate foeneratorum . . . rem creditori palam populo solvit, libraque et aere liberatum emittit. It should be observed that the term manum injicere is here also applied to manum depellere. Thus we have manus injectio against manus injectio, just as in other cases we have sacramentum against sacramentum. In the Twelve Tables (iii. 3) the vindex, in acting as described, is said 'vindicare'; it is a case of force (manum depellere) against force (manum injicere). Cp. Demelius, *Die Confessio*, p. 56, and infra, note 15.

[12] Cp. Jhering, *Geist d. röm. Rechts*, vol. i. p. 152 ff.

is the judgement-debt, i. e. a fixed sum which a person has been condemned to pay by the sententia of a sworn judge 'in judicio'. An 'aeris confessus', or person who had admitted a money debt in jure before the magistrate, was regarded as occupying the same position as a judgement-debtor, and was thus liable to manus injectio pro judicato. Several later statutes assimilated other debts to judgement-debts, the harsh effects of the manus injectio, however, being in most cases mitigated—by a certain lex Vallia—in such a manner as to allow the debtor to be his own vindex and 'manum sibi depellere' himself, so that he (the debtor) became the defendant in the resulting action (if any) and was himself liable in duplum in case of condemnation. Thus there were two species of this form of actio, first, the L. A. per manus injectionem pro judicato (where the debtor could only defend himself through a vindex), and, secondly, the L. A. per manus injectionem pura (where the debtor might defend himself in person). But in any case the manus injectio which had been carried out in jure remained the formal subject of the law-suit and of the judgement, because in point of form the actio, or claim to a judicium, did not spring directly from private law, but from the manus injectio.

V. Legis Actio per pignoris capionem.

Pignoris capio is a process akin to manus injectio. The law invested debts of a particular kind with special privileges by allowing the creditor to obtain satisfaction for them by an extra-judicial seizure of portions of the debtor's property. Every such authorized pignoris capio was characterized by the use of certain prescribed words (certa verba) which had to accompany its execution. The distrainee was bound to redeem the property seized within a prescribed interval, and was, probably, bound to pay a penalty besides, in default of which we may presume that the ownership in the goods distrained passed to the distrainor. The latter generally exercised his right of ownership by destroying the things (pignora caedere), since the primary object of the distraint was not to satisfy the creditor, but to punish the refractory debtor.

The distrainee must have had the right, in some form or other, of protesting before the magistrate in jure against the distraint that had taken place. Just as, in the preceding instances, the proffering of an oath (sacramentum) by one party compelled the other to tender a counter-oath, and a manum injicere on the part

of one necessitated a manum depellere on the part of the other, so here the pignoris capio compelled the distrainee, if he wished to make any defence, to enter a protest. Here, then, was another case of an issue, duly formulated by the parties according to the law, which the magistrate had no power to reserve for his own decision, but was bound to send for trial before a judex. It was in this way that pignoris capio begot an action, viz. the L. A. per pignoris capionem.[13]

The cases in which pignoris capio was available, were not, as far as we can see, sufficient in themselves to give rise to ordinary civil proceedings. They were partly claims of a public nature—e. g. a soldier's claim for his pay, for money to buy a horse, or for barley to feed his horse, or again the claims of farmers of the public revenue for arrears of taxes due to the State—partly matters of private liability which we may describe as not having been legally enforceable in the early times. Thus if a victim had been sold for sacrificial purposes by means of an informal contract of sale, or again, if a beast of burden had been let out under an informal contract of letting with a view to investing the consideration money in the purchase of a sacrificial lamb for Jupiter, the guardian deity of harvests—in neither case did the purchaser or hirer respectively incur any legal liability. It is possible that pignoris capio was also resorted to in the case of 'damnum infectum'; that is to say, where a man's property, though not yet actually injured, was in danger of being injured by the state of his neighbour's property (e. g. by the dilapidated condition of his house), he was perhaps allowed to seize some of the neighbour's land by way of pignoris capio.[14]

In none of these cases was there any action at law. Nor was the legis actio sacramento available, because in an action on a debt

[13] Cp. Gaj. iv. 32; Jhering, *Geist*, &c., vol. i. p. 159 ff.; Karlowa, *Legisactionen*, p. 201 ff.; Mommsen, *Röm. Staatsrecht* (3rd ed.), vol. i. p. 177, note 1; Wlassak, *Processgesetze*, vol. i. p. 251 ff.

[14] This is von Bethmann-Hollweg's conjecture (*Civilprocess*, vol. i. (1864) p. 204, note 13), which has been endorsed by several learned writers, e. g. Karlowa, *Legisactionen*, p. 216 ff.; Wach, in his edition of Keller, *Röm. Civilprocess*, 6th ed. § 20, note 267 a. It has however been disapproved, more particularly by Burckhard in Glück's *Commentar zu den Pandekten*, book 39 (1875), p. 77 ff., and by Wlassak, *Processgesetze*, vol. i. p. 259 ff.—Pignoris capio was certainly applicable to land, the practical effect being that the land was laid waste and the house levelled to the ground (pignus caedere); Mommsen, *Staatsr.*, vol. i. (3rd ed.) p. 160.

GAJ. Inst. IV § 11: Actiones quas in usu veteres habuerunt legis actiones appellabantur, vel ideo quod legibus proditae erant (quippe tunc edicta praetoris, quibus complures actiones introductae sunt, nondum in usu habebantur), vel ideo quia ipsarum legum verbis accommodatae erant, et ideo immutabiles proinde atque leges observabantur: unde eum qui de vitibus succisis ita egisset ut in actione vites nominaret, responsum est rem perdidisse, cum debuisset arbores nominare, eo quod lex XII tabularum, ex qua de vitibus succisis actio conpeteret, generaliter de arboribus succisis loqueretur.

§ 49. *The Formulary Procedure.*

The solemn act by which the parties themselves, at the conclusion of the proceedings in jure, formulate the legal issue (litis contestatio), constitutes the pith and climax of the legis actio procedure which we have just described. The oral formula of the parties, framed in strict adherence to, and operating by virtue of, the letter of the law, begets the 'actio', i.e. the concrete, formal right to a judicium, and, at the same time, supplies the foundation upon which the judicium proceeds.

This solemn act of procedure cannot be repeated.[1] It necessarily follows, therefore, in the first instance, that the solemn litis contestatio of the legis actio procedure operates ipso jure to destroy the right of action. That is to say, at the very moment when the litis contestatio gives birth to the actio in the formal sense of the term (i.e. to the right to claim a judex for the dispute in question), the actio in its material sense (i.e. the right to the litis contestatio) is annihilated. The litis contestatio can only be carried out once and no more. Its effect is to *consume* the right of action.

It follows, moreover, in the second place, from the same rule that, if a mistake has been made in the formula, there is no way of correcting it and saying the formula over again in an amended shape. A faulty formula entails the loss of the action, for the oral formula admits of neither repetition nor amendment.[2] The

15; Gradenwitz, *Zwangsvollstreckung u. Urteilssicherung* (Berliner Festschrift f. Gneist), 1888; Matthiass, *Die Entwicklung des römischen Schiedsgerichts* (Rostocker Festgabe f. Windscheid), 1888, pp. 5–18.

[1] Precisely the same idea is to be found in the old German procedure where the rule 'a man a word' was applied, i.e. every man has only one word which, once uttered, can neither be retracted nor repeated nor amended.

[2] GAJUS, iv. 108: Alia causa fuit olim legis actionum; nam qua de re actum semel erat, de ea postea ipso jure agi non poterat; nec omnino ita ut nunc usus erat illis temporibus exceptionum. Cp. GAJ. iv. 11, cited at the top of this page.

use of the oral formula is attended with the risks incident to an action, because it is itself an act which operates to consume a right of action.

It was, however, inevitable that the oral formula should soon prove inadequate for the purpose for which it was designed, the purpose namely of formulating the dispute for the decision of the judex. The oral formulae were immutable, because the wording of the statutes on which they were founded was immutable. But the law which was developing on the basis of the verba legis was none the less changeable. True, the letter of the law frequently received, in practice, a sufficiently liberal interpretation. On the strength of a section of the Twelve Tables dealing 'de arboribus succisis', the practice of the courts subsequently admitted an action 'de vitibus succisis'. But the wording of the Twelve Tables, and consequently also the wording of the oral formula, remained the same. In the litis contestatio the plaintiff had to speak de arboribus succisis, even when, as a matter of fact, he intended to sue de vitibus succisis.[3] But how was the judex to find out the real meaning of the parties from a litis contestatio framed in that manner? The result, inevitable in such circumstances, was, that the litis contestatio became a mere mask for covering a variety of cases of a widely different character. Thus it happened, often enough, that the formulating of the legal issue, as carried out in the litis contestatio, was little more than a pretence. In order to pierce the mask and discover the true nature of the issue before him, the judge had to resort to other expedients.

To all this must be added one other circumstance. The legis actio procedure was, so to speak, cut down and restricted to a definite number of statutable claims. It was a difficult matter (as we see in the case of the arbores and vites) to force a new law into the old moulds. But from about the middle of the third century B. C. onwards, as the inroads of the jus gentium became stronger and stronger, a large number of fresh claims arose (such as the bonae fidei judicia, claims on informal sales, informal lettings and hirings, and others), not based on, nor recognized by, any Roman statute, and lacking therefore the necessary credentials without which the procedure by legis actio remained closed to them. A new law for

[3] Cp. supra, p. 232, note 3.

which there was no room within the narrow confines of the old legis actio was pushing its way into the Roman system. New skins were needed for the new wine.

And so it happened that at the same time when the forms of legal redress supplied by the legis actio began to fall short of the material requirements of the law, the necessity for a reform in Roman civil procedure (the legis actio procedure) became more pronounced.

It is characteristic of the tendency which marks the development of Roman law that a remedy by means of legislative enactment was not resorted to. It was time enough to invoke the interference of so inelastic an agency, when the aim and method of the desired reform had been clearly ascertained. Meanwhile the judicature was left to its own resources. The task of reforming Roman law thus naturally devolved on the praetor.

There was no need for the praetor to cast about for an idea upon which the requisite reforms might proceed: such an idea had already been found.

The legis actio was the form of action prescribed by the jus civile, that is, by the law peculiar to Roman citizens, the law of the Roman people. Such a form of action was only available as between Roman citizens. Neither the law nor the procedure of Roman citizens—in other words, neither 'civil' law nor 'civil' procedure—could have any application where a non-citizen, a peregrinus, was a party, for peregrini were excluded from the jus civile. As far as foreigners were concerned, the legis actio simply did not exist. In course of time, however, a form of procedure was developed in which aliens were competent to appear as litigant parties. As early as 242 B. C. a special praetor—the praetor peregrinus—had been appointed to deal with actions in which one or both of the parties were aliens (supra, p. 73). A regular procedure for actions of this kind could only be worked out by the aid of the jus honorarium. The new procedure, therefore, which the praetor, in the free exercise of his imperium as the supreme judicial officer, created in order to meet the requirements of alien litigants, was a procedure based on the jus honorarium, and as such was opposed to the procedure for citizens, which was based on the jus civile. But in shaping the procedure for aliens the praetor was of course guided by the practice which obtained as between citizens.

In actions to which foreigners were parties there was nothing, in point of law, to prevent the praetor—since 242 B. C. the praetor peregrinus—from deciding the issue himself by virtue of his sovereign imperium. Nevertheless, it became the standing rule for the praetor in such cases to follow the practice of the city court by referring the decision of the issue to one or more private individuals acting under oath—the rule of the foreign praetor being to appoint *several* persons (called 'recuperatores') for that purpose.[4] The Roman State was growing strong and could afford to be liberal in its treatment of foreigners.[5] Notwithstanding the fact that the official authority of the magistrate was formally unrestricted, the Romans preferred that the law should be dispensed to foreigners in such a way that they themselves should be obliged to acknowledge it as law. Hence the practice of nominating several sworn judges, the intention being that each party should be represented by at least one man in whom he had confidence.[6] Hence also the principle that the judgement of the recuperatores, like that of the judex in the legis actio procedure, must derive its legal force, not alone from the official authority of the magistrate, but also, in an equal measure, from a formal agreement whereby the parties voluntarily submitted themselves to the court.

Whenever the foreign praetor referred a matter for decision to a court of recuperatores, there was obviously the same necessity for a litis contestatio, a formulation of the issue, on the basis of which the decision of the court was to proceed, as there was in the legis actio procedure. Here again the magistrate came to the assistance of the parties. It was the business of the praetor to constitute the court of sworn judges; it was he who appointed the recuperatores. In drawing up his decree of appointment it was essential that he should indicate the nature of the duty he required the judges to perform. But in this instance there was no lex to which reference could be made. What the praetor therefore did was to state the issue in his decree of appointment, and then to order the judges, by virtue of his imperium, to find for or against the defendant (as the case might be) according as certain specified conditions were fulfilled or not. Thus the task of formulating the

[4] Cp. supra, p. 227, n. 3.
[5] Cp. Mommsen, *Abriss d. röm. Staatsrechts* (1893), pp. 62, 63.
[6] Besides the representatives of the parties there was an umpire, so that the number of recuperatores was usually three or five.

issue was carried out by the praetor himself in the written decree which he drew up in appointing the recuperatores. This decree was called the 'formula', because it soon became the practice for the praetor to frame it after the model of certain 'forms' or 'formulae' set out in the praetorian album. The drawing up of the formula was not, however, an autocratic act of the praetor, performed without reference to the parties. It was essential that the parties themselves should accept the formula in due legal form. The plaintiff accordingly gave it to the defendant, and this giving and taking of the formula by the parties, carried out under the supervision and sanction of the magistrate, constituted the specific agreement—the 'processual' agreement—which bound the parties to abide by the decision of the sworn judges on the issue as formulated (cp. p. 226, n. 2). The effect of these proceedings, like that of the corresponding proceedings in the legis actio, was a judicium inchoatum; that is to say, they marked the commencement of a regular procedure, analogous to the procedure in the city court, under which the issue was tried and decided by a court of sworn judges—a procedure not originating in an actio in the sense of the jus civile, nor resting on any popular statute for its foundation, but called into operation by a formal agreement between the parties to which the praetor lent the sanction of his magisterial imperium.

Such was the process by which the 'formulary procedure' established itself in the court of the foreign praetor. There were now two distinct forms of procedure, in each of which the issue was tried and decided by a court of one or more sworn judges, the judicium of the legis actio procedure being founded on the jus civile, while that of the formulary procedure was a 'judicium imperio continens.' The only practical difference between the two procedures was in the manner in which the formulation of the issue (the litis contestatio) was effected; in other words, in the manner in which the parties obtained their judicium. In the civil procedure—the legis actio—the issue was formulated by means of an oral formula based on a popular statute; in the formulary procedure by means of a written formula drawn up by the magistrate and accepted by agreement between the parties. The oral formula was rigorously confined to a limited number of claims; the written formula was in its nature capable of being adapted to the greatest variety of claims. It is obvious at once that as between the two rival forms of

procedure, all the advantages were on the side of the formulary procedure.

The formulary procedure was, at one and the same time, the procedure required by the jus honorarium and the procedure required by the law which governed the relations of foreigners, the jus gentium. The very same antitheses that dominate the history of Roman private law are reflected in the history of Roman procedure. And it is just at this point that we are enabled to obtain a deeper insight into the workings of that process of development which ultimately produced the Roman jus gentium. It would be natural enough to suppose that the formulary procedure was borrowed from some foreign system, say, Greek or even Phoenician law. But such was not the case. It was an absolutely original creation of the Roman praetors, produced without any outside help whatever—a striking example of the peculiar technical genius of the Romans. The decisive impulses that determined the shape of the new procedure are not to be found in any foreign system of law: they sprang from the Roman jus civile itself. The procedure applied to foreigners was a copy of the procedure which obtained among citizens, with its sharp division of jus and judicium. The jus gentium was the offspring of the jus civile. As the result of a steady process of development *from within*—a process guided by the strong hand of the praetor and moulded by the powerful exigencies of an ever-widening commerce—the jus civile, of its own strength, brought forth the jus gentium.[7] In the earliest stages of its growth—whether in the field of substantive law or of procedure—the jus gentium invariably appears in the form of

[7] Cp Degenkolb, *Rechtseinheit u. Rechtsnationalität im altrömischen Reich* (Rectorial Address, 1884), pp. 15, 16: 'From the outset Roman law showed a remarkable capacity for reforming itself spontaneously from within—a capacity which had its seat in the constitution of the Roman judicature and, still more, in that quality of orderly precision which from the earliest times characterized the Roman treatment of legal science. It is this capacity that lies at the foundation of the development of the Roman law of ownership, the Roman system of contracts, and also of the Roman law of succession.... But its effects appear most strikingly in the manner in which the Romans subjected whatever elements they imported from Greek law—whether these were numerous or few we need not now inquire—to a process of what jurists call "specification"; in the manner, that is, in which they worked up the imported matter into a new form and presented it virtually as new law. In substance, no doubt, the rules on maritime loans, jettison of goods, and hypothec are derived from Greek law, but as fitted and worked into the orderly system of Roman actions, they partake of that specifically Roman character which belongs to the actio.'

jus honorarium, that is, of law existing only by virtue of the magisterial imperium and applicable only to foreigners. But we soon observe a change. Slowly, but irresistibly the jus gentium invades the domain of the jus civile itself; praetorian rules, designed at first only for foreigners, come to be recognized as between Roman citizens, and are thus clothed with the character of law in the strictest sense of the term. And this triumphant advance of the jus gentium was rendered all the more easy by the fact that, in its essence, the Roman law for foreigners was simply a younger form of civil law, an embodiment, in fact, of the civil law of the future. In its infancy the jus gentium was jus honorarium; having undergone a period of probation and attained to manhood—it was tested more particularly in its application to foreign trade—it took its place definitively as part of the civil law of Rome.

The development of Roman procedure moved on exactly the same lines. What was originally a procedure for foreigners, became a procedure as between Roman citizens: the formulary procedure passed into a civil procedure.

It has been pointed out that the necessity for a reform of Roman civil procedure had become urgent. The legis actio, with its narrow formalism, fell far short of the requirements of the times. On the other hand, people were growing familiar with the formula, which was not fettered by the letter of any statute and could be readily adapted to any legal claim deserving of protection. It was natural enough, therefore, that the idea should suggest itself of extending the use of the formula (the force and value of which had been clearly perceived in proceedings before the foreign praetor) to disputes between citizens themselves. The praetor urbanus took the decisive step for giving effect to this idea. By a bold exercise of his imperium juris civilis *corrigendi* gratia he allowed the issue in actions betweeen cives to be formulated by formula instead of by legis actio.

The result of this proceeding on the part of the praetor was to create a conflict (as far as the procedure in the city court was concerned) between the civil law (which required legis actio) and the praetorian law (which gave the formula), a conflict the sharpness of which must have been all the more noticeable, because at that time the praetorian power was as yet in the earliest stages

of its development, and the legis actio was associated with the powerful influence of the pontifices. It was the pontifices who created, developed, and interpreted the legis actio. To assail the legis actio was to assail the influence which the pontifical jurisprudence exercised over civil procedure and, consequently, over the interpretation of the civil law itself. By giving preference to the formula, the praetor thus came into collision with that influential college which till then had been the sole depositary of the civil law. It was at this moment that interference by legislative enactment became necessary.

The popular enactment which struck in at this point was the lex Aebutia (about 130 B. C.).[8] This enactment was followed at a considerable interval by the lex Julia judiciorum privatorum, which was probably the work of Augustus. The lex Aebutia confined itself to proceedings in the city court, the court of the praetor urbanus, which was, as already explained, the home of the legis actio procedure. It provided that in actions instituted in that court (where both parties were necessarily Roman citizens) it should be lawful to proceed by formula only, *without* legis actio; that a litis contestatio effected by formula should constitute a 'processual' agreement with statutory validity and that, consequently, the judgement of the sworn judex on the issue as framed in the formula should have the force of a judgement founded on statute, should, in other words, be a valid judgement according to the jus civile. The great controversy was thereby settled. Within the court of the praetor urbanus the formulary procedure had been declared a *civil law* modus agendi. Formula and legis actio were thus, as far as the civil law was concerned, placed on a footing of equality. A judicium instituted in the city court by means of a formula only was now just as much a judicium *legitimum* as one instituted by legis actio—provided of course that the ancient traditional requirements of a valid judicium for Roman citizens were, in other respects, satisfied.[9] Henceforth it was only in the

[8] Much information as to the date of the lex Aebutia has been yielded by the researches of Girard, published in the *ZS. d. Sav. St.*, vol. xiv. p. 11 ff.

[9] That is to say, the judicium must be appointed within the first milestone from Rome; the parties and the judex must all be fully qualified citizens, and there must be 'unus judex' only. In accordance with a practice of very old standing, the foreign praetor used to nominate several judges (recuperatores); in actions between citizens, on the other hand, it had been the rule from the earliest times to have only one judge.

court of the praetor peregrinus and in courts held outside Rome that the formulary procedure, as such, was a 'judicium imperio continens' ('judicium quod imperio continetur'). In these courts the procedure remained untouched. Here the magisterial imperium did not need any assistance from popular legislation, because its authority was unquestioned. But the city court of the praetor urbanus was the stronghold of the civil law and of the legis actio, the specifically Roman form of civil procedure. The power of the praetor urbanus was, in truth, unequal to the task of ousting the legis actio from its strongest position. The assistance of the legislature was needed, and the method employed was to depreciate the legis actio—at once the product, and the source of power, of the pontifical jurisprudence—by investing the formula, for purposes of the city court, with a legal character. Thus the formulary procedure became legally available even in civil law causes; it became, in short, a civil procedure. The legis actio procedure was not yet actually abolished. An option was left to the parties whether they would proceed by legis actio in the old way, or would avail themselves of the formula according to the new method. The formula had, however, secured free scope for itself. It had now an opportunity of putting forth all its inherent capabilities. And in the competition between the two forms of procedure, there was, from the outset, no doubt which would win. In the legis actio procedure the formulation of the issue was an act full of pitfalls for the parties, inelastic and rigidly formal; in the formulary procedure the same act, stripped as it was of all the old formalism, had acquired elasticity, a capability of indefinite expansion, and a ready adaptability to claims of all kinds. Through being tied to the verba legis the legis actio was, in many cases, reduced to absolute unreality and hollowness. In the formula, on the other hand, the issue could be formulated without any restrictions; it set out the real matter in dispute and was not a mere empty form beneath which the truth lay concealed. Everything, in short, was in favour of the formula. The natural result was that, in the practice of the courts, the formulary procedure came, by universal consent, to be substituted for the legis actio procedure in the great majority of cases. The culminating point was marked by the lex Julia already referred to, which, like the lex Aebutia, was concerned with the procedure of the court of the praetor

urbanus, and provided that henceforth the appointment of sworn judges should *only* be effected by means of a formula, and not on the ground of a preceding legis actio.[10] The result was practically, and with a few exceptions presently to be mentioned, to abolish the legis actio. The formulary procedure had now become *the* civil procedure of Roman law. The object of the proceedings in jure had been definitely changed. The place of the old litis contestatio was taken by the processual agreement embodied in the formula, and this agreement now constituted the principal, and also the concluding, act of the proceedings in jure. Henceforth it was the question contained in the formula and no other that the judex was required to decide in judicio.

The so-called introduction of the formulary procedure by means of the above-mentioned enactments was, if our view be the true one, a process of the kind we have just detailed.[11] It was not, as we see, a sudden reform, a revolution, but merely the consummation of what had been gradually preparing itself. These laws were not the first to introduce the written formula; what they did was merely to emphasize its victory over the oral formula, which till then had existed side by side with it, a victory which itself was due to the logical necessities of the progressive evolution of the law.

There are two further facts which tend to corroborate and, at the same time, to illustrate the view concerning the nature of the development of the formulary procedure which we have just endeavoured to render plausible.

The first of these facts is this, that whenever an action was to be

[10] A second lex Julia—Gajus (iv. 30) mentions 'duas Julias'—probably referred to legal procedure in the Roman country towns (the municipia), its object being to do for the municipia what the other lex Julia had done for Rome, viz. to replace the legis actio by the written formula. Wlassak, *Processgesetze*, vol. i. p. 191 ff.; vol. ii. p. 221 ff.

[11] In dealing with this portion of my subject I have availed myself of the results obtained by the researches of Wlassak, as set forth more particularly in his *Römische Processgesetze* (supra, p. 225, n. 1)—as to which see some recent observations in Grünhut's *ZS. für öffentliches u. Privatrecht*, vol. xix. p. 729 ff. The idea that the formulary procedure had its origin in the procedure applied to foreign litigants was first broached by Huschke. The result of the labours of Wlassak has been to place our views on this important process on a sound basis of textual authority and, at the same time, to show that in many respects they needed correction. In the *ZS. d. Sav. St.* (vol. xix. p. 276, note 2) Erman communicates an observation by Wlassak on a parallel development traceable in the history of Greek law.

decided in judicio by the judges of the so-called centumviral court, a written formula was not used, the proceedings being conducted in accordance with the forms of the ancient legis actio procedure (L. A. sacramento)—a practice which continued without break throughout the whole classical period of the Empire, at least as late as Diocletian. Actions concerning inheritances therefore (which in later times were certainly the most important matters falling within the jurisdiction of the centumviral court) were still conducted according to the old traditional forms of the legis actio sacramento. And the reason was simply this, that the centumviral court already constituted a standing college of judges which did not require to be called into existence in each separate instance by the written decree of the praetor. In such cases there was accordingly no possibility of instituting a judicium, because a competent judicium, viz. the centumviral judicium, was already forthcoming. And inasmuch as this judicium was not called into existence by a praetorian decree of appointment, it followed, on the one hand, that the praetor had no means of binding the centumviri by instructions as to the conditions under which they should condemn or acquit, and, on the other hand, that the parties were debarred from concluding a 'processual' agreement through the medium, and subject to the limitations, of the praetorian decree. The absence of the praetorian decree of appointment thus explains everything; it explains why, in these cases, the formula did not come into use concurrently with the legis actio, and why the ancient litis contestatio was preserved; why, in short, in causes coming before the centumviral court the legis actio (sacramento) was not superseded by the formulary procedure. In the judicia privata, where a private individual had each time to be appointed judex for the nonce, the litis contestatio of the old jus civile had found a rival in the praetorian decree of appointment: no such rivalry could spring up where there was no judex to appoint.[12]

The second fact has reference to the so-called voluntary jurisdic-

[12] The decemviral court was dissolved by Augustus; otherwise it is certain (as is very happily pointed out by Mommsen, *Staatsr.*, vol. ii. 3rd ed., p. 608, n. 1) that the old legis actio sacramento would have been preserved in cases coming before it, i. e. in actions relating to personal freedom. Of course there was no more occasion for the use of a formula or decree of appointment in the case of the decemviral court than there was in the case of the centumviral court.

tion, i. e. that kind of judicial procedure which serves the purpose, not of determining rights which are in dispute, but of establishing new rights. An example of this jurisdiction occurs in the case of in jure cessio, i. e. the transfer of a right by means of a confessio in jure (supra, p. 57). Inasmuch as, in this case, the allegation of title put forward by the fictitious plaintiff (the transferee of the right) is immediately followed in jure, before the magistrate, by the jural confession of the fictitious defendant (the transferor), no necessity, of course, arises for proceeding to a judicium, simply because there is no legal issue to decide. For the very same reason there is also no occasion for a formula, because there is no judex to appoint. The result was that in jure cessio, as long as it was actually in use (i. e. throughout the whole classical period and even longer), retained the forms of the legis actio procedure, the particular legis actio employed being again the L. A. sacramento.

Both these facts signify one and the same thing, namely that wherever there is no occasion for instituting a judicium in any particular case by means of a decree of appointment, there neither formula nor formulary procedure comes into use, and the ancient legis actio procedure holds its own.[13]

The lex Aebutia and the leges Juliae did not entirely abolish the legis actio procedure and establish the formulary procedure as the only recognized legal procedure. What they did was rather this: wherever, as a matter of fact, the formulary procedure was already in practical use, in other words, wherever, as a matter of fact, the parties were in the habit of employing, not the old oral formula,

[13] According to GAJUS, iv. 31, lege agere was still possible in later times in cases of damnum infectum (supra, p. 237). The proceedings in connexion with apprehended damage do not, in the first instance, constitute an action at law at all, but are merely designed for the protection of the threatened party, a protection which, in the old law, was apparently secured by means of pignoris capio. In place of the latter procedure the praetorian law substituted, not the formulary procedure, but a proceeding extra ordinem, under which the praetor, in the exercise of his official power, exacted from the defendant a stipulatio, or promise of indemnity, for the purpose of saving the threatened party harmless. The result was that, in this instance too, the legis actio remained in use, because in such cases, according to the praetorian law, no judex was appointed and consequently no formula was granted. In other cases of the ancient pignoris capio the praetor granted a formula on a fiction that the pignoris capio had actually taken place (GAJUS, iv. 32), i.e. he instructed the judex to decide the case just as though the pignoris capio had actually been carried out, and in this way the legis actio was superseded. It is only where there is no formula, no decree of appointment, that the legis actio survives.

but the written formula, as the medium for carrying out their processual agreement, and the sententia of the judex accordingly proceeded on the basis of that formula—in those cases alone (and they formed, it is true, the great majority) the above-mentioned laws *confirmed* the formulary procedure, and at the same time swept away the fossilized relics of the concurrent legis actio procedure. But where the formulary procedure was not in use—as in matters falling under the jurisdiction of the centumviral court and the cases of 'voluntary jurisdiction' and damnum infectum (note 13)—the laws referred to did not introduce the formulary procedure.

Thus in matters coming before the centumviral court the old legis actio sacramento remained, but in all judicia privata—that is, wherever private individuals were appointed for the nonce to act as sworn judges—the formulary procedure henceforth prevailed. The change meant simply that henceforward the judex, in order to find an authoritative statement of the issue upon which he was to deliver his sententia, would have to look to the decree of appointment as drawn up by the magistrate and accepted in due form by the parties, in other words, to the communication which the praetor's written formula conveyed to him in reference to the legal issue submitted to him for decision. In other respects everything remained as before. The severance of jus and judicium remained, nor was there any change in the rule which confined the magistrate's duties to the introductory stages of the suit (the admission of the claim and the formulating of the issue), and reserved the final decision for the judex. The magisterial appointment of the judex continued, as before, to be coupled with a formal processual agreement between the parties. Nothing was changed except that the formal foundation of the judicium had been shifted. The processual agreement between the parties, which determined the task of the judex, was now concluded through the medium of the written formula 'granted' by the praetor, and no longer through the medium of the oral formula founded on popular statute. In effecting such a reform by means of the lex Aebutia and the leges Juliae, it is quite possible that men merely imagined they were ridding themselves of some futile and antiquated formalities, and perhaps also (at the time of the lex Aebutia) of the predominant influence of the pontifices over the legal procedure of the city of Rome. The reform, such as it was, was probably not regarded as

possessing any unusual significance, and we can hardly suppose that the Romans were conscious of having accomplished anything great, in view more especially of the fact that the idea of a fundamental reform of civil procedure never occurred to their minds—a fact proved clearly enough by the way in which they treated matters appertaining to the centumviral court.

In real truth, however, the reform which had thus been carried to its conclusion, was one of the utmost importance in its far-reaching practical results.

GAJ. Inst. IV § 30: Sed istae omnes legis actiones paulatim in odium venerunt. Namque ex nimia subtilitate veterum qui tunc jura condiderunt eo res perducta est, ut vel qui minimum errasset, litem perderet; itaque per legem Aebutiam et duas Julias sublatae sunt istae legis actiones effectumque est ut per concepta verba, id est per formulas, litigemus. § 31: Tantum ex duabus causis permissum est lege agere, damni infecti et si centumvirale judicium futurum est. Sane quidem cum ad centumviros itur, ante lege agitur sacramento apud praetorem urbanum vel peregrinum praetorem; damni vero infecti nemo vult lege agere, sed potius stipulatione quae in edicto proposita est obligat adversarium suum, idque et commodius jus et plenius est.

§ 50. *The Formula.*

The formula (i. e. the decree appointing the judex or the several recuperatores) had now become the medium through which the litis contestatio was effected, through which, in other words, the processual agreement was concluded whereby the legal issue was formulated for the purpose of a decision in judicio.[1] The written formula of the magistrate superseded the oral formula of the parties.

In point of legal force this new kind of litis contestatio was theoretically inferior to the solemn act of the parties in the legis actio procedure. An act of writing was, in the eye of the early law, an informal act, and was therefore in itself, in the legal sense of the jus civile, no actio at all, i. e. it was not an act by which a person's statutory right of action was, at the same time, exercised and exhausted (supra, p. 240). There was nothing in the nature of the formula itself or in law (ipso jure civili) to prevent the formula

[1] As to the form of the litis contestatio in the formulary procedure, v. supra, p. 226, n. 2. The formula granted by the praetor was either handed to, or occasionally dictated to, the defendant by the plaintiff.

from being retracted, repeated, or amended, if the decree of the praetor so directed. Being a mere creation of the jus honorarium, it did not, according to the civil law, operate as a litis contestatio at all, so that there was legally speaking (ipso jure) no reason why the identical claim should not be brought before the praetor by action and carried to a judicium twice over. The lex Aebutia and the Julian legislation made the judicium legitimum (p. 247) the only exception; that is to say, the civil law had given its recognition to the formulary procedure only in cases of actions instituted between Roman citizens within the first milestone from Rome. If the plaintiff in a judicium legitimum sued by actio in personam (§ 52) with an intentio juris civilis (§ 51), the effect of the formula, like that of the old legis actio, was ipso jure to consume the right of action and render any repetition of the proceedings impossible. In all other cases however—and they formed the great majority—the praetor was obliged, in each separate instance, to insert an explicit instruction, in the shape of an express 'exceptio rei judicatae vel in judicium deductae', in order to prevent a matter which, under the formulary procedure, had already led to the institution of a judicium and had perhaps even been carried to final judgement, from passing through every stage of an action a second time.[2] From this it appears that it was not the action as such (neither the institution of the judicium nor the sententia of the judex) which operated to consume the right of action in the early law of procedure, but solely that solemn legal act by means of which the party himself brought about the appointment of a judex, in other words, the legis actio in the strict sense of the term, the old formal litis contestatio. And

[2] GAJ. Inst. IV §§ 106, 107: Et si quidem imperio continenti judicio actum fuerit, sive in rem, sive in personam, sive ea formula quae in factum concepta est, sive ea quae in jus habet intentionem, postea nihilominus ipso jure de eadem re agi potest; et ideo necessaria est exceptio rei judicatae vel in judicium deductae. Si vero legitimo judicio in personam actum sit ea formula quae juris civilis habet intentionem, postea ipso jure de eadem re agi non potest, et ob id exceptio supervacua est; si vero vel in rem vel in factum actum fuerit, ipso jure nihilominus postea agi potest, et ob id exceptio necessaria est rei judicatae vel in judicium deductae.—In the case of a judicium legitimum, however, (if the plaintiff sued by actio in rem or in factum) the praetor was, ex officio, under a statutory obligation to grant the exceptio (which belonged in this instance to the class known as 'civil' exceptiones, infra, p. 277), whereas in an action brought imperio continenti judicio it was within the discretion of the praetor whether he would grant the exceptio or not. Cp. Wlassak, *Cognitur*, p. 67; *Processgesetze*, vol. ii. p 356; H. Erman, *ZS. d. Sav. St.*, vol. xix. p. 261 ff.

this very act had been dropped in the formulary procedure. In contemplation of law, the operative force of the processual agreement as embodied in the formula was—apart from the exception adverted to—inferior to that of the old litis contestatio.

Nevertheless this modest formula, this written notice, so bald and succinct, which the praetor conveyed to the judex, contained potentially the entire future development, not only of the law of Roman civil procedure, but also of Roman private law and, with it, of Roman law in general.

The ancient legis actio procedure, with its litis contestatio tied to set traditional words, offered but an extremely limited choice of ways in which to formulate the legal issue. If none of these traditional forms was strictly appropriate, the only remedy supplied by the civil law was to have recourse to the so-called procedure by sponsio (agere per sponsionem). A made a formal promise (sponsio) to his opponent B that, if the allegation of fact or law put forward by B were true, he (A) would pay a sum of money. This sponsio could be enforced by a legis actio sacramento in personam (supra, p. 238), and the judicium on the sponsio would involve a judicium and sententia on the question of law or fact which formed the basis of the promise. The amount of the sponsio was never actually paid, because a sponsio of this kind (a so-called sponsio praejudicialis) was not designed for the recovery of a sum of money, but was merely intended to bring on an action, being simply a device for forcing on legal proceedings.[3]

On the other hand, there was no tradition to fetter the formula of

[3] It was different with the so-called sponsio poenalis, which was a sponsio as to the result of an action, the parties themselves contemplating the payment of the money. On the defendant's tendering a sponsio poenalis, the plaintiff had to reply with a 'repromissio', i. e. a promise to pay the same amount if defeated in the action. No repromissio was required in a sponsio praejudicialis. GAJ. IV. §§ 13, 94, 171; Bekker, *Actionen*, vol. i. p. 246 ff.—The procedure by sponsio was also available for the determination of disputes as to ownership, so that a person who wished to bring a vindicatio had the choice of proceeding either by formula petitoria (with a direct claim for delivery of possession of the thing), or by way of sponsio, in which case the plaintiff's formal claim was for payment of the wager which the defendant had forfeited by his failure to prove himself owner. The process called 'vis ex conventu', or 'deductio quae moribus fit', appears to have been used in connexion with the vindicatio by way of sponsio, for the purpose namely of determining which of the parties should be deemed in possession, and which of them, therefore, should be respectively plaintiff and defendant in the suit. For an interesting discussion of this topic see Mitteis, *ZS. d. Sav. St.*, vol. xxiii. p. 282 ff.

the praetor. In the old litis contestatio the issue was formulated in narrowly prescribed terms; in the new formula the terms used were informal and freely chosen by the magistrate. Through the medium of the formula, therefore, any questions, or complex of questions, which the praetor deemed actionable, could by virtue of the processual agreement of the parties be directly submitted to a judex for decision in judicio. The praetor himself was now in a position, while formulating the legal issue, to give the judex at the same time direct instructions in reference to the decision of such issue. For whether the judge condemned or acquitted depended now solely on the manner in which the praetor formulated the question in dispute for purposes of the processual agreement between the parties.

The formula was bound to become, and did in fact become, the instrument by means of which, not only the wording, but also the decision of the legal issue was emancipated from the trammels of the ancient statute-law and the exclusive influence of the civil law. The formula, in a word, was the weapon by which the praetor and his jus honorarium were enabled to assert their dominant influence over the whole development of Roman law.

The praetor had had no control over the legis actio. Its development and interpretation were entirely in the hands of the pontifices. In the legis actio procedure the judex was independent of praetorian instructions. Officially he was only bound to abide by such instructions regarding his judicium as were contained in the solemn litis contestatio of the parties, and in giving his decision on the issue thus joined, he was obliged to act in accordance with the *civil* law, and more especially in accordance with the pontifical interpretation. In jure the magisterial power was paramount; in judicio, however, the old civil law, preserved and handed down by statute and pontifical tradition, and operating through the judex as its organ, held absolute sway. But now the relation between praetor and judex, and, with it, the relation between the jus praetorium and jus civile, was altered. The praetorian decree of appointment (formula) had come to be binding even in civil law matters. Even in civil law cases it was now not enough that the judex should simply decide in accordance with the civil law; he was obliged, in the first instance, to decide on the basis of the formula as drawn up by the praetor and accepted in due form by the parties, having regard always to such limitations and instructions as were conveyed in that formula. Thus

within the domain of the civil as well as the praetorian law the judex became dependent on the praetor. He was bound by the instructions (formula) of the praetor to find in favour of the defendant even where, according to the civil law, he ought to have condemned him. In other cases he was bound, conversely, in virtue of the praetor's instructions again, to condemn the defendant where the civil law would have required a decision in his favour (§§ 51, 53). At one stroke the judex had been converted from an organ of the civil law into an organ, in the first instance, of the praetorian law.

Through the medium of the formula the praetor now controlled the processual agreement between the parties, and, through it, the entire procedure even in civil law matters. The edict began henceforth to dominate legal procedure and the general development of the law. Apart from the centumviral causes, the enforcement, in the courts, of the civil law was now entirely subject to the limitations which the praetor by his edict thought fit to impose on it.

The lines are thus marked out upon which Roman law in the whole course of its subsequent development proceeded. It is certain that the formulary procedure obliterated, beyond recovery, the sharp distinction which had hitherto existed between jus and judicium. The judex ceases to be, even for the jus civile, an independent private individual, bound by nothing but the positive law. He becomes an organ of the magisterial power and is already beginning to assume the character of a subordinate official. In this way the development of the formulary procedure helped very decisively to prepare the way for the subsequent elimination of the antithesis between jus and judicium (§ 57). And while thus securing control over the judex, the praetor at the same time definitively appropriated to himself a predominant influence over the whole evolution of Roman law. The formulary procedure marks the beginning of that vigorous development of the jus honorarium, so momentous in its consequences, which resulted in the metamorphosis of the jus civile and the birth of classical Roman law. A reform of procedure was followed by a reform of the law itself.

§ 51. *Intentio and Actio.*

Every formula commences with the appointment of a judge (Titius judex esto), or of several judges (Titius, Maevius et Lucius

recuperatores sunto). This appointment—itself the origin of the formula—now only serves the purpose of introducing the real substance of the formula.

The formula is generally framed as an order to condemn, and consists accordingly, as a rule, of two main parts: the 'intentio' and the 'condemnatio'. The form is, in outline, as follows: If you (judex) are satisfied that such and such a right exists, or such and such a fact is true (intentio), condemn the defendant (condemnatio); if not, absolve him: si paret, condemna; si non paret, absolve. The intentio specifies the condition on which the condemnatio is to take place. It formulates the question at issue, i. e. the question an affirmative answer to which (si paret) means a decision in favour of the plaintiff. The nature of this question and, consequently, the contents of the intentio determine the nature of the action. There are as many different kinds of actions as there are different kinds of intentiones.

Now the question at issue may be one either of law or of fact. Whether a thing belongs by the civil law to the plaintiff, or whether the defendant is under a civil obligation to do something, is a question of law. In such cases the intentio is framed to include the words '. . . ejus esse ex jure Quiritium' or 'dare (facere) oportere', and the actio is said to be an actio 'in jus concepta'.

But the question at issue may be merely one of fact. Civil ownership is not alleged nor civil liability. All that is alleged is some particular fact, or group of facts, to which the praetor, and he alone, has annexed a right of action. For example: it is a question of fact whether A has pledged a thing by way of hypothec to B; and if B can prove his case, he is entitled—only, however, by the praetorian law, and not by the civil law—to bring a real action on the pledge. Again, it is a question of fact whether a freedman has summoned his patron before the court without previous leave from the praetor, but it is a fact to which, if true, the praetor—and he alone—annexes a penal action in favour of the patron against the libertus. In these cases the intentio does not affirm any right, but simply states certain facts the truth or untruth of which determines the result of the action. An actio with an intentio framed in this manner is called an actio 'in factum concepta'.[1]

[1] There is also an actio in factum *civilis*, i. e. an actio in factum with an intentio *in jus* concepta. An actio in factum of this kind was an action for

The actio in factum concepta is the instrument by which the praetor actually creates new rights unknown to the civil law, such as the rights adverted to above (the right of hypothec, the right of the patron to demand the punishment of a disrespectful freedman).

But there are other means by which the praetor achieves the same result. He may retain the intentio juris civilis, i. e. the intentio in jus concepta, but, at the same time, modify and supplement it in a manner unknown to the civil law. He may instruct the judex to accept as a fact the existence of the civil law claim conveyed in the words 'ejus esse ex jure Quiritium' and 'dare oportere', but to accept it subject to such conditions as he (the praetor) thinks fit to formulate on his own responsibility. To take an instance. In Roman civil law an obligation can never be assigned. Even if the creditor sells and assigns his right to another, the right to sue does not thereby, according to the civil law, pass to the assignee, but continues to reside in the creditor (the assignor). The praetor, however, gives the assignee the assignor's right of action—the right, that is to say, to contend 'dare oportere' (with an intentio in jus concepta)—but, in doing so, he modifies the intentio in such a way as to instruct the judex to treat the assignee as the real creditor, and to decide accordingly. It is thus we get the so-called actio utilis. An actio utilis is an action with a modified intentio, an action that can be adapted to, or 'utilized' for, new cases. It is opposed to the 'actio directa', in which the intentio appears in its original form, the form namely on which the intentio of the actio utilis is modelled. Thus in the example chosen the creditor or assignor has the actio directa, the assignee the actio utilis.

There is one particular form of actio utilis which is specially important, and that is the so-called actio ficticia. An actio ficticia is an actio utilis in which the modification of the intentio consists in the insertion of a fiction. The judex is told to assume that a requirement of the civil law upon which the truth of the intentio

which the edict contained, as yet, no form, so that the formula had to be framed independently in each separate case (in factum). In the introductory part (the demonstratio) the actual concrete facts of the case were set out, and on the ground of these facts an intentio was granted in the following form: quidquid ob eam rem dare facere oportet (ex bona fide). The actio in factum civilis is identical with the actio praescriptis verbis (§ 79). Thus an actio in factum, simply, is an actio with an intentio in factum concepta, but an actio in factum civilis is an actio with a demonstratio in factum concepta. Cp. l. 6 § 1 C. de transact. 2, 4.

depends is satisfied; in other words, he is told to disregard the fact that, in reality, the requirement is not satisfied. The actio Publiciana in rem may serve as an illustration. It is a utilis rei vindicatio, i. e. a rei vindicatio (an action for asserting ownership, with an intentio: ejus esse oportere ex jure Quiritium) in which the intentio appears in a modified form. If I receive a thing by purchase and delivery from a person who is not the owner of it, I do not, to begin with, become owner of the thing, but I may become owner ex jure Quiritium by means of usucapio (infra, p. 318 ff.), if I remain in possession of the thing thus bona fide acquired for a certain definite period. If this period of usucapio has expired, I have the true, the directa rei vindicatio, because I am owner according to the civil law. But until the period has expired I cannot have a true rei vindicatio according to the civil law, because I am not yet owner. Nevertheless, in such circumstances, the praetor is prepared, for good reasons, to grant a rei vindicatio even before the period of usucapio has run its full course, except, indeed, as against the true owner himself. And he proceeds in this way. He modifies the intentio of the rei vindicatio by inserting a fiction: the judex is told to assume (by a fiction) that the period of prescription has already expired; in other words, he is told to disregard the fact that, in reality, it has not yet expired. In short, the praetor gives to the person whose period of usucapio is still incomplete a ficticia rei vindicatio, the so-called actio Publiciana in rem (§ 66), the intentio of which runs as follows: 'Si quem hominem Aulus Agerius emit et is ei traditus est, *anno possedisset*, tum si eum hominem quo de agitur ex jure Quiritium ejus esse oporteret....' We observe, then, that it is an actio in jus concepta. The question at issue (intentio) is one of civil law (ejus esse oportere ex jure Quiritium), but modified in such a manner that, in spite of the civil law, the usucapio possessor is protected by means of the action in precisely the same manner as if the period of prescription had run its full course. The usucapio possessor (like the owner) has a rei vindicatio, but in his case it is a utilis rei vindicatio (the actio Publiciana). It is probable that the actio ficticia was the oldest form of the actio utilis. For in the actiones ficticiae the praetor, though really developing the civil law, nevertheless adhered to it as closely as he possibly could.

But the antithesis between actio directa and actio utilis is not limited to actiones in jus conceptae. It applies equally to actiones in

factum conceptae, although in dealing with the latter the praetor was, from the outset, acting within the limits of his special sphere of power. The praetor has (let us suppose) annexed a right of action to a particular state of facts. It subsequently appears to him desirable, in the interests of justice, to annex the same right of action to another state of facts closely analogous to the former state. He accordingly takes the action designed for the state of facts originally contemplated, and adapts it to the new state of facts by introducing a modification into the intentio, in which, in such cases, the facts were set out. The former action was the actio directa, the latter the actio utilis. A good illustration is furnished by the actio hypothecaria. The only case in which, in the first instance, a pledgee was given a real action against the pledgor who was in possession of the thing pledged, occurred when a tenant farmer of a praedium rusticum pledged his farming stock, his 'invecta and illata', to his landlord as security for his rent. In such a case the landlord's right of pledge was protected by the 'actio Serviana', which was an actio in factum concepta. It soon appeared, however, that it was desirable, in the interests of equity, to extend the advantages of an action of this kind from landlords to pledgees of every description. Hence pledgees other than landlords were given the actio Serviana utilis or actio quasi-Serviana; in other words, they acquired the same right as landlords to sue on pledges, the only difference being that in their case the intentio appeared, of course, in a modified form.

Thus the actio directa is the original on which another action is modelled, and this other action—the actio utilis—is the copy.

Actiones utiles, like actiones in factum, are always praetorian actiones (actiones honorariae), i. e. they are based on the jus honorarium. On the other hand, an actio directa is either an actio civilis (viz. when it is based on the civil law) or an actio honoraria (e. g. in cases where an actio in factum is the model on which an actio utilis is framed).

The actio utilis, like the actio in factum concepta, is always symptomatic of legal progress, whether the law affected be the civil or the praetorian law.[2]

Both these forms of action, the actio utilis and actio in factum

[2] Cp. Wlassak, in Pauly's *Realencyklopädie d. klassischen Altertumswissenschaft, sub verbo* 'actio', columns 19, 20.

concepta, are illustrative of the power which the praetor exercised, in the first instance, over the judex and, through him, over the development of the law in general. The subordination of the judex to the praetor binds the former to abide by the instructions he has received and to condemn the defendant in an actio in factum or an actio utilis, in spite of the fact that the requirements of the civil law have not been fulfilled.

The contrasts with which we have hitherto been dealing—actio civilis and honoraria, actio in jus and in factum concepta, actio directa and utilis—are contrasts of a purely formal kind. They are based on the external relation in which the intentio stands to the civil law, on the one hand, and to the praetorian edict on the other; in other words, on the external relation between the intentio and the positive law.

But the intentio possesses a much greater interest when viewed in reference to its matter, i. e. when viewed in reference to the *rights* which claim to be realized through the medium of the intentio. When regarded from this point of view, the various classes of intentiones are found to exhibit the whole system of actions, a system which is, itself, but a reflex of the system of private law.

Gaj. Inst. IV § 41: Intentio est ea pars formulae qua actor desiderium suum concludit, velut haec pars formulae: SI PARET N. NEGIDIUM A. AGERIO SESTERTIUM X MILIA DARE OPORTERE; item haec: QUIDQUID PARET N. NEGIDIUM A. AGERIO DARE FACERE OPORTERE; item haec: SI PARET HOMINEM EX JURE QUIRITIUM A. AGERII ESSE.

§ 45 eod.: Sed eas quidem formulas in quibus de jure quaeritur in jus conceptas vocamus, quales sunt quibus intendimus NOSTRUM ESSE ALIQUID EX JURE QUIRITIUM, aut NOBIS DARI OPORTERE, aut PRO FURE DAMNUM DECIDI OPORTERE: in quibus juris civilis intentio est. § 46: Ceteras vero in factum conceptas vocamus, id est, in quibus nulla talis intentio concepta est, sed initio formulae, nominato eo quod factum est, adjiciuntur ea verba per quae judici damnandi absolvendive potestas datur; qualis est formula qua utitur patronus contra libertum qui eum contra edictum praetoris in jus vocavit, nam in ea ita est: RECUPERATORES SUNTO. SI PARET ILLUM PATRONUM AB ILLO LIBERTO CONTRA EDICTUM ILLIUS PRAETORIS IN JUS VOCATUM ESSE, RECUPERATORES ILLUM LIBERTUM ILLI PATRONO SESTERTIUM X MILIA CONDEMNATE: SI NON PARET, ABSOLVITE. . . . et denique innumerabiles ejusmodi aliae formulae in albo proponuntur. § 47: Sed ex quibusdam causis praetor et in jus et in factum conceptas formulas proponit, veluti depositi et commodati: illa enim formula

quae ita concepta est: JUDEX ESTO. QUOD A. AGERIUS APUD N. NEGIDIUM MENSAM ARGENTEAM DEPOSUIT, QUA DE RE AGITUR, QUIDQUID OB EAM REM N. NEGIDIUM A. AGERIO DARE FACERE OPORTET EX FIDE BONA, EJUS JUDEX N. NEGIDIUM A. AGERIO CONDEMNATO, NISI RESTITUAT; SI NON PARET, ABSOLVITO, in jus concepta est; at illa formula quae ita concepta est: JUDEX ESTO. SI PARET A. AGERIUM APUD N. NEGIDIUM MENSAM ARGENTEAM DEPOSUISSE EAMQUE DOLO MALO N. NEGIDII A. AGERIO REDDITAM NON ESSE, QUANTI EA RES ERIT, TANTAM PECUNIAM JUDEX N. NEGIDIUM A. AGERIO CONDEMNATO; SI NON PARET, ABSOLVITO, in factum concepta est. Similes etiam commodati formulae sunt.

§ 52. *The System of Actions.*

I. Actiones in personam and Actiones in rem.

Every intentio is so framed as to be either personal (in personam) or impersonal (in rem). An intentio in personam names the person of the defendant (who is to be condemned on certain conditions), an intentio in rem does not name the person of the defendant, but only the person of the plaintiff, i. e. the person who claims the right. Upon this antithesis is based the supreme division of all actions into actiones in personam, where the intentio is in personam, and actiones in rem, where the intentio is in rem.

The antithesis is not merely an external one, but is grounded on a fundamental difference in the nature of private rights themselves. The rights we have called 'obligatory rights', which form one class of private rights, are co-extensive with the liability of a single person, viz. the debtor, and it is impossible to specify the particular obligatory right which is meant without, at the same time, naming this particular person. The person of the opponent (the debtor), and therewith the person of the defendant, is pointed to, and marked out, by the very nature of the plaintiff's right. The intentio, whether in jus or in factum concepta, must specify the person of the debtor, because he (the debtor) individualizes the right. Where there is a different debtor, the right itself is different. The intentio thus runs e. g. si paret N^{um}. N^{um}. A°. A°. dare oportere. On the other hand, what distinguishes all the remaining rights (more especially, though not exclusively, real rights like ownership) from obligatory rights is the fact that they do not correspond to the liability of one definite person, but are rights which not only subsist, but can, if necessary, be enforced against everybody. Rights of

this kind are never, as such, available against any particular person. It is only when the plaintiff's right is violated that the person against whom his right is available, in other words, the person of the defendant, is ascertained. And the plaintiff has the same right of action, on the ground of the same right, every time this right of his is violated. The right remains the same, however different the parties against whom it is enforceable. In such cases the intentio is impersonal (e. g. si paret hominem quo de agitur A¹. A¹. esse ex jure Quiritium), i. e. it does not specify the defendant, whose name does not appear till the condemnatio.

Thus the nature of the intentio determines the nature of the actio.

An action arising from an obligatory right is an actio in personam, an action arising from any other right (ownership, right of pledge, paternal power, right of succession, &c.) is an actio in rem. Or, to put it in terms of private law: an obligatory right is a right the content of which is relative as against a definite person, the remaining rights are rights the contents of which are absolute.

II. Actiones in rem.

Real actions (actiones in rem) arise either from real rights (infra, § 60 ff.), such as ownership (rei vindicatio, actio negatoria), or from family rights, such as the power of the paterfamilias over his children (vindicatio filii in potestatem), or from rights of succession (hereditatis petitio, interdictum quorum bonorum), or from rights of 'status', i. e. rights to a recognition of one's personal standing (e. g. of one's ingenuitas, parentage, freedom from patria potestas). The actions on questions of status belong to the class known as 'praejudicia', i. e. to those actions of Roman law the object of which was to obtain, not the condemnation of the defendant, but merely a judicial acknowledgement of a legal relation, such as liberty.[1]

The so-called actio in rem scripta is not an actio in rem, but an actio in personam, springing from an obligation and available, therefore, against an existing defendant, but with this peculiarity that the person liable is not specifically determined, but is only characterized by a general description to which different persons may answer at different times. It is therefore an actio in personam in which the person of the defendant varies from time to time. An example would be the actio quod metus causa (p. 209), by which

[1] For more details on the praejudicia v. Bekker, *Actionen*, vol. i. p. 283 ff.

a man who has concluded a juristic act under the influence of fear claims to recover the property he has involuntarily parted with from any one who is now, for the time being, in actual enjoyment of the benefits accruing from the act in question, e.g. the person who is now, for the time being, owner of the thing alienated metus causa. The effect of the action is real (i. e. it is 'in rem scripta'), in so far as it is directed not only against the author of the metus, but also against any third party to whom the former may have transferred ownership in the thing; but the action is not a real action, because the plaintiff cannot rest his claim against the third party on his ownership (the defendant himself being owner), but must rest it on an obligation springing from the metus and aiming at the retransfer to the plaintiff of the ownership he had involuntarily given up. Another example occurs in the case of a partition suit where one co-owner of property claims the partition of the joint property from any one who is, for the time being, co-owner of the same property.

III. Actiones in personam.

Obligations arise either from contracts (or facts analogous to contracts), or from delicts (or facts analogous to delicts). Hence all actions in personam are either contractual (or quasi-contractual) or delictual (or quasi-delictual) (§ 77).

IV. Actiones stricti juris and Actiones bonae fidei.

Contracts are either stricti juris negotia or bonae fidei negotia according as the liability involved is precisely determined or not (§ 76). Hence all contractual actions are either actiones stricti juris (actions on loans, stipulationes, &c.) or actiones bonae fidei (actions on sales, lettings, bailments, &c.). An actio stricti juris is called a condictio if the formula does not state the ground on which the action is based (p. 388, n. 6).

The intentio in an actio bonae fidei is always incerta (quidquid N^{um}. N^{um}. A°. A°. dare facere oportet ex bona fide), the intentio of an actio stricti juris is only incerta when the express object of the negotium stricti juris is an incertum. In cases of an incerta intentio (i. e. in all cases of bonae fidei actions) the intentio opens with a so-called demonstratio, i. e. with a clause naming the contract from which the claim for the incertum (the quidquid) arises. For example: quod A^{us}. A^{us}. apud N^{um}. N^{um}. hominem deposuit, quidquid, &c.

V. Actiones ex delicto.

A delict may render the delinquent liable to pay either compensation or a penalty or both, and in the last case the same action may be available for the double purpose of claiming compensation and exacting the penalty, or, again, the delict (e. g. theft) may give rise to two independent actions: one for the recovery of compensation (e. g. the condictio furtiva), the other for the recovery of a penalty (e. g. the actio furti). Hence all delictual actions are either rei persequendae causa comparatae (reparatory), or poenae persequendae causa comparatae (penal), or mixtae (reparatory and penal).

The right to sue for the penalty consequent on the commission of a delict may either be confined to the person injured or may be open to everybody (cuivis ex populo). Hence all penal actions (actiones poenae persequendae causa comparatae, actiones poenales) are either private (open only to the injured party), or 'populares'.

§ 1 I. de actionibus (4, 6): Omnium autem actionum quibus inter aliquos apud judices arbitrosve de quaque re quaeritur summa divisio in dua genera deducitur: aut enim in rem sunt aut in personam. Namque agit unusquisque aut cum eo qui ei obligatus est vel ex contractu vel ex maleficio: quo casu proditae sunt actiones in personam per quas intendit adversarium ei dare aut dare facere oportere, et aliis quibusdam modis; aut cum eo agit qui nullo jure ei obligatus est, movet tamen alicui de aliqua re controversiam: quo casu proditae actiones in rem sunt, veluti si rem corporalem possideat quis quam Titius suam esse affirmet, et possessor dominum se esse dicat: nam si Titius suam esse intendat, in rem actio est.

§ 13 eod.: Praejudiciales actiones in rem esse videntur: quales sunt, per quas quaeritur an aliquis liber vel an libertus sit, vel de partu agnoscendo.

§ 20 eod.: Quaedam actiones mixtam causam optinere videntur, tam in rem quam in personam: qualis est familiae erciscundae actio, quae competit coheredibus de dividenda hereditate. Item communi dividundo, quae inter eos redditur inter quos aliquid commune est, ut id dividatur; item finium regundorum, quae inter eos agitur qui confines agros habent.

§ 53. *Condemnatio and Exceptio.*

I. Condemnatio.

The condemnatio is the clause in the formula by which the praetor orders the judex to condemn the defendant. The condition on

which the condemnatio is to take place is contained in the intentio. If the intentio is true, the judex is to condemn. It is only in the actiones prejudiciales (p. 264) that the formula consists of nothing but an intentio, a condemnatio not being needed in such cases, because the sole purpose of the formula is to require the judex to make a pronouncement (pronuntiatio) on the specific question (say, of status) submitted to him.

The condemnatio, as ordered by the praetor, invariably consists in a direction to the judex to condemn the defendant in a sum of money (pecuniaria condemnatio), even in cases where the plaintiff has established a claim to the restitution (restituere) or production (exhibere) of a definite object which is in the possession of the defendant.

Not only in the earlier, but also in the classical period of Roman law, direct judicial execution was only possible in respect of indisputable money debts. Hence it was the business of the judex, while conclusively establishing the plaintiff's right by means of his judgement, to convert this right at the same time into a right to a pecuniary sum.[1]

But the pecuniaria condemnatio frequently operates unfairly, more especially in such cases as those just adverted to, viz. suits where the plaintiff claims the restitution or production of property. The plaintiff may, for example, have proved that he is owner of some object which the defendant withholds from him. Since, however, the defendant is merely condemned in a sum of money, the result is that the plaintiff, though he establishes his ownership in the rei vindicatio, does not recover the object which belongs to him, but merely receives the pecuniary damages paid to him by the defendant. The defendant, therefore, though defeated in the suit, remains in possession of the object. Nay, what is more, the moment he pays the plaintiff the damages—the litis aestimatio (quanti ea res est)—he becomes, by the praetorian law, the owner of the object. The upshot of the action in which the plaintiff successfully establishes his ownership is that he (the plaintiff) is expropriated and loses his ownership. And there are numerous other instances where the same rule produces the same unsatisfactory

[1] Cp. Ivo Pfaff, *Zur Lehre von der condemnatio pecuniaria im römischen Formularprozess* (Vienna, 1902; reprinted from Ullman's *Juristische Vierteljahrsschrift*, vol. xxxiv).

result. Thus a usufructuary who (by the actio confessoria) has established his right to the restoration of the object of the usufruct; a pledgee who (by the actio in rem hypothecaria) has made good his claim to the delivery-up of the object pledged; a lessor who (by the actio locati) has proved his right, after the expiration of the term of letting, to have the object he let returned to him; a commodator or a depositor who (the former by the actio commodati directa, the latter by the actio depositi directa) claims the restitution of the object he lent, or deposited for safe custody, respectively; a pledgor who, after discharging the debt for which he gave the pledge, claims (by the actio pignoraticia directa) that the pledgee should return him the object pledged; a person who, having parted with property under the influence of dolus or metus, claims (by the actio de dolo or the actio quod metus causa, respectively) to have the property thus wrongfully obtained restored to him; an heir who claims (by hereditatis petitio) that the merely supposititious heir shall make over to him (the real heir) the inheritance of which he has taken possession; an owner who with a view to bringing a rei vindicatio sues by the actio ad exhibendum for the production of the object which the defendant has in his possession, in order to be able to establish its identity with the object which he himself is missing—in every one of these and in other cases, the plaintiff, though successful, finds himself in the same unsatisfactory position. In all the instances given the claim is for the restitution or, in the last case, for the production of property,[1a] but even if the action is successfully carried through, the result of the principle of a mere pecuniary condemnatio is that the plaintiff's claim is, in effect, not satisfied, but merely settled.

The same unsatisfactory result ensues where a purchaser claims by the actio redhibitoria to have a contract of sale rescinded on the ground, say, of latent defects in the article purchased. The money condemnation only gives him a sum representing his interest in the rescission of the contract (quanti ea res erit), but not what he is really entitled to demand, viz. the rescission itself, which

[1a] In the case of an actio de dolo or actio quod metus causa the relief claimed by the plaintiff might go further than what we have indicated in the text. If, for example, a transfer of ownership had taken place in consequence of the fraud or the threats, the claim would be, not merely for a re-transfer of possession (i. e. a restitutio in the narrower sense of the word), but for a re-transfer of ownership, a re-*traditio*.

would involve, on the part of the purchaser, the return of the article purchased, and, on the part of the vendor, the refunding of the price paid, or else a discharge from all obligations under the sale. Thus, in spite of the condemnation of the defendant, he (the plaintiff) is forced, say, to keep the animal he has purchased, though he may have found it, perhaps, to have some infectious disease.

Even in the case of a noxal action it is quite conceivable that the condemnatio might not do justice to the interests of the plaintiff. If a slave commits a delict, the master becomes liable, he being given the option either of taking the consequences of the delict on his own shoulders (paying a fine and damages), or else of surrendering the slave to the party injured by the delict (noxae deditio). But take the case of an 'injuria'. A slave has used abusive language to the plaintiff. The condemnatio directs the master either to surrender the slave or to pay a small sum of money. The master will naturally adopt the second course. But such a form of redress gives the plaintiff but scant satisfaction. The money is of no use to him. The requirements of the case would be far more adequately met, if, instead of money being paid, the slave were ordered to be flogged by way of punishment.

The common feature in all these cases is this, that the pecuniary condemnatio is incapable of really satisfying the just demands of the plaintiff.

A difficulty of a different kind arose in regard to stricti juris negotia, i.e. in regard to transactions (such as stipulatio, § 80) in dealing with which a strict and literal interpretation was always adopted. If, for example, the promisor in a stricti juris negotium had undertaken to do something at a certain place (if e.g. he had bound himself by stipulatio: Ephesi centum dare), the performance of the promise could only be demanded at that particular place, nor could the defendant be condemned at any other place. For the defendant had never promised to perform anywhere else, and if the creditor sued him elsewhere, he (the creditor) was demanding something different from what he had been promised (plus petitio), and was bound to lose his action. On the other hand, it was perhaps practically impossible for the plaintiff to prosecute his suit at the place in question (say, Ephesus), because the defendant persistently avoided going there, and legal proceedings against a

defendant who was absent were unknown to the older law. Here was a case where the creditor might reasonably ask for some redress. The interests of justice required that he should have the right to sue at a different place, provided of course that, in that case, he demanded, not the literal performance of what had been promised him, but only an amount representing his interest in the performance, the advantages or disadvantages of the specified locality being taken into consideration in assessing such amount. To attain this end, however, the form of the condemnatio had to be modified. For, in an actio stricti juris, what the defendant was condemned to pay was never an amount representing the plaintiff's interest in the performance of the act, but simply the absolute value of the act as expressed in a pecuniary sum. Thus, if the plaintiff in an actio stricti juris (condictio certi) sued for a specified amount, the sum laid in the condemnatio was not a sum equivalent to the special value to the plaintiff of the amount in question, but precisely the specified amount itself, neither more nor less.[2] It was the same where the plaintiff sued, not for a sum of money, but for the delivery of a definite thing or for any other act which had been promised by a stricti juris negotium. All the successful plaintiff, proceeding by an actio stricti juris, could have awarded to him was the objective value of the particular thing or act, and not his own peculiar interest in one or the other. And this objective value he could recover nowhere but at the very place at which the act had been promised. If he sued at any other place, he would be suing for something that was not due to him, and would consequently be defeated in his action.

We see, then, that in the first class of actions mentioned above (where restituere or exhibere is claimed), and in the same way in the actio redhibitoria, and practically also in the specified instance of the noxal action, the injustice consisted in the fact that the defendant could only be condemned in a pecuniary sum representing the plaintiff's interest, and could not be condemned to give the plaintiff specific satisfaction; whereas, conversely, in the actiones

[2] When, for instance, performance was delayed, the plaintiff in an actio stricti juris was not entitled to have the loss he suffered in consequence of such delay (e. g. the loss of interest on money) considered in assessing the amount payable by the defendant. For the same reason the benefit or detriment accruing from performance at a particular place could not be taken into account.

stricti juris the injustice consisted in the fact that the defendant could not be condemned to pay a sum representing the interest of the plaintiff, but only a sum representing the objective value of the act.

These cases embraced elements of the greatest variety, but in every one of them the evil, such as it was, had its origin in the narrowness of the condemnatio—the narrowness consisting either in the fact that the condemnatio was a mere money condemnatio, or (in the case of the actiones stricti juris) in the fact that the money condemnatio was rigidly confined within certain narrow limits. The praetor was consequently in a position to apply the same remedy to all such cases alike, the remedy namely of modifying the condemnatio. He gave the judex the power to pronounce not merely a condemnatio, but also, if he saw fit, an 'arbitrium', i.e. a decision determined by the particular circumstances of the case. An arbitrium is a judgement enlarged in scope and freed from the trammels besetting a condemnatio proper.

Thus, for example, in actions relating to ownership and other similar actions, where a restituere or exhibere is asked for, the justice of the case will be best met, if the defendant is required to give the plaintiff specific satisfaction. As soon, therefore, as the plaintiff's ownership or other right has been established by a pronuntiatio, an arbitratus (jussus) de restituendo or de exhibendo is addressed to the defendant. If he disregards it, execution, it is true, does not issue. For neither in the early nor in classical Roman law was execution possible for any but a money debt—which is just the very reason why a money condemnatio is the only true condemnatio. Instead of execution, however, condemnatio follows, and, if the defendant deliberately fails to comply with the order, the judge calls upon the plaintiff to affirm on oath (jusjurandum in litem) the value to him of the thing in question. If the defendant has acted in wilful contempt of the arbitratus de restituendo, it is most probable that the judge, on the strength of the plaintiff's oath, will condemn the defendant in a sum far in excess of the actual value of the thing. In other words, a money condemnatio, when preceded by an arbitratus de restituendo, becomes an instrument for punishing a contumacious defendant. By this means a mode of execution was secured for the arbitrium

de restituendo, which, though only indirect, was none the less effective, and, as far as the vast majority of cases was concerned, undoubtedly removed the injustice of the pecuniaria condemnatio.

The actio redhibitoria was treated in the same way. Before proceeding to the condemnatio the judge would pronounce an arbitrium to the effect that the purchaser should restore the object purchased, together with its accessions, and that the vendor should refund the purchase money he had received or discharge the purchaser from his liability under the sale, as the case might be. If the vendor, without good cause, failed to obey the arbitrium, the judex proceeded to condemn him to pay double the value (l. 45 D. 21, 1). And, on the same principle, where a noxal action was brought on the ground of an insult by a slave (actio injuriarum noxalis), the judex, before condemning the master, called upon him by arbitratus to surrender his slave with a view to the infliction of corporal punishment to an extent to be determined by the judex. If he failed to comply, the judex would (most probably) increase the fine he imposed.[3]

In cases of actiones stricti juris, where the object was to obtain a condemnation of the defendant at a different place, the matter was simpler still. The praetor empowered the judex to pronounce an arbitrium condemning the defendant to pay a sum representing the plaintiff's interest in the performance, the locality being thus taken into consideration. In this instance the arbitrium was substituted for the condemnatio. The defendant was not simply condemned to do what he had bound himself to do, but was ordered by arbitratus to satisfy the interest of the plaintiff, the judex being authorized to take into account the advantages and disadvantages accruing to the plaintiff and defendant respectively from the particular place in question. Thus, if the performance at some place other than the place promised was more advantageous to the plaintiff than performance at the place promised, the defendant might conceivably be condemned to pay less at this other place than he had actually promised. In this case the arbitrium was followed, not

[3] On both these cases v. Lenel, *Edictum*, pp. 438, 324. If the defendant complied with the arbitrium, he was not condemned, so that, in the case of an actio redhibitoria, he escaped all further consequences by refunding the simplum (scil. pretium). That such is the meaning of l. 45 D. 21, 1 is shown by Bechmann, *Der Kauf*, vol. i. p. 403, and Eck, *Das Ziel der actio redhibitoria* (*Juristische Abhandlungen für Beseler*, 1885).

by the condemnatio, but by execution. An arbitrium of this kind admitted of execution, because it directly ordered the payment of money.[4]

We have now determined the conception of an actio arbitraria. It is an action in which the order to condemn is framed in terms of considerable latitude. The position of the judex is less fettered, because he is authorized to pronounce an arbitratus. It is in this sense that the actions referred to are actiones arbitrariae, viz. the actions claiming restituere and exhibere, the actio redhibitoria, the noxal action for an insult by a slave, as well as the action on a negotium stricti juris where the plaintiff asks for the amount of his interest (the locality being taken into account). In all these cases the remedy resorted to for obviating an injustice is the same, viz. a modification of the condemnatio.

Thus, in the formula for an action claiming the restitution or production of property, the direction to condemn was preceded by a clause authorizing the judex to pronounce an arbitratus de restituendo or de exhibendo. The instructions did not run simply: condemna, but: neque (nisi) arbitratu tuo restituetur (exhibebitur), condemna. The defendant could only be condemned (in a money payment) after the order to restore (the 'arbitrium') had been issued and disregarded.[5] Similarly in the actio redhibitoria the condemnatio was preceded by a clause: si arbitratu tuo is homo (viz. the purchased slave) redhibebitur (by the purchaser) . . . et . . . pecunia non reddetur (by the vendor); and in the noxal action above referred to it was preceded by a clause: nisi arbitratu tuo servum verberandum exhibebit (or some such words).

An action in which the plaintiff, suing on the ground of a stricti juris negotium specifying the place of performance, claims the amount of his interest in such performance, is called by modern civilians the arbitraria actio de eo quod certo loco. The Romans

[4] Cp. Lenel, *Edictum*, p. 193 ff.

[5] The term restituere covers a variety of acts differing in different actions. Thus it may include the delivery-up of the 'fructus' produced by the object in question, the assignment of rights of action which have arisen in reference to it, &c. When the possessor of an inheritance, after being defeated in a hereditatis petitio, is ordered to 'restore' the inheritance, such an order may involve the payment, by such possessor to the real heir, of a debt which he (the possessor) owed to the deceased, or it may involve the surrender 'noxae causa' of a slave who has committed a delict (e. g. an act of damage or a theft) against some property belonging to the inheritance (cp. l. 40 § 4 D. 5, 3). Cp. also note 7.

called it the actio arbitraria simply, applying the term, not, as in the case of the other actiones arbitrariae, in a generic sense, but as a specific name.[6] It was *the* actio arbitraria, because, as already stated, it always resulted in an arbitrium and never in a condemnatio, in the technical sense of the term. The formula merely instructed the judex to decide according to his own arbitratus, his own equitable discretion, and to award either the amount actually promised, or a larger or a smaller sum, according as he saw fit.

Thus in the actiones arbitrariae greater latitude was allowed to the judex in the same way as in the actiones bonae fidei. But there was this distinction that, in the actiones bonae fidei, the judex exercised a wider discretion in virtue of the intentio, in the actiones arbitrariae in virtue of the condemnatio. In other words, in an actio bonae fidei the necessity for an exercise of discretion on the part of the judex arose from the very nature of the plaintiff's right which formed the subject-matter of the suit; in an actio arbitraria it arose (quite independently of the nature of the plaintiff's right) from the command of the praetor, from the particular form, namely, in which in such cases he framed his order to condemn. It is quite possible that one and the same action may be both bonae fidei and arbitraria, but, if so, it is the intentio that makes it bonae fidei, the condemnatio that makes it arbitraria.

Gaj. Inst. IV § 48: Omnium autem formularum quae condemnationem habent ad pecuniariam aestimationem condemnatio concepta est.

§ 31 I. de act. (4, 6): Praeterea quasdam actiones arbitrarias, id est ex arbitrio judicis pendentes, appellamus, in quibus, nisi arbitrio judicis is cum quo agitur actori satisfaciat, veluti rem restituat vel exhibeat vel solvat vel ex noxali causa servum dedat,[7] condemnari debeat. Sed istae actiones tam in rem quam in personam inveniuntur. In rem, veluti Publiciana, Serviana de rebus coloni, quasi Serviana, quae etiam hypothecaria vocatur. In personam, veluti quibus de eo agitur quod aut metus causa aut dolo malo factum est. Item qua id quod certo loco promissum est petitur. Ad exhibendum quoque actio ex arbitrio judicis pendet. In his enim actionibus et ceteris similibus permittitur judici ex bono et aequo secundum cujus-

[6] Cp. Lenel, *Edictum*, p. 195.

[7] For an explanation of these words v. note 5.—The noxal action as such is not an actio arbitraria. It does not contain an arbitrium, and the condemnatio runs: aut tantam pecuniam aut in noxam dedere. It was only in the exceptional case mentioned in the text (pp. 269, 273) that the condemnatio was preceded by an arbitratus de verberando.

que rei de qua actum est naturam aestimare, quemadmodum actori satisfieri oporteat.

II. Exceptio.

In the case of an actio arbitraria we have a modification of the condemnatio the effect of which is to enlarge the powers of the judex in regard to the condemnatio; in the case of an exceptio, on the other hand, we have (as the word implies) an exception to the condemnatio the effect of which is to restrict the powers of the judex in regard to the condemnatio.

The normal state of the case is this: if the intentio is true, the judge must condemn. The effect of an exceptio is that, contrary to the general rule, the judge does not condemn, notwithstanding the truth of the intentio. The praetor forbids him to condemn, if the exceptio is proved, in spite of the fact that, in itself, the truth of the intentio would require a condemnation. The materiality of the facts pleaded by means of the exceptio is thus invariably determined by the praetor in the express instructions which he conveys to the judex. Hence the opposition between a defence operating 'ope exceptionis', and a defence operating 'ipso jure'. Whenever the defendant claims a verdict on the ground of the wording of the intentio, he is relying on a defence operating ipso jure; whenever he claims a verdict on the ground of the wording of the condemnatio—on the ground, that is to say, of an exception expressly inserted in the instructions to condemn—he is relying on a defence operating ope exceptionis. That is the reason why a defence operating ope exceptionis must be pleaded in jure, in the first stage of the proceedings, before the magistrate; in other words, why a defendant who relies on such a defence must apply to have an exceptio expressly inserted in the formula. On the other hand, a defence which operates ipso jure (by virtue of the intentio itself), may be set up in judicio before the appointed judge, even where the defendant has omitted to plead it in jure.

The essence of the exceptio lies in the expression which it gives to the opposition between the praetorian and the civil law. For example: the plaintiff has been promised 100 aurei in some stricti juris negotium (say, a stipulatio), in a transaction, that is to say, the obligations arising from which are rigorously and literally interpreted. He has, however, subsequently released the debtor by an informal act, a 'pactum de non petendo'. In such a case the pactum

de non petendo is void by the civil law; by the praetorian law, however, it is valid. The plaintiff now brings his action, an actio stricti juris (condictio certi). The intentio runs; 'Si paret N^um^. N^um^. (the debtor) A°. A°. (the creditor) C dare oportere.' The intentio is true, for by the civil law (dare *oportere*) the debtor still owes the creditor 100 aurei, notwithstanding the pactum de non petendo. The defendant therefore would have to be condemned. The praetor, however, inserts in his order to condemn an exception to this effect: si inter A^um^. A^um^. et N^um^. N^um^. non convenit ne ea pecunia peteretur (the so-called exceptio pacti de non petendo). If therefore the debtor can prove the pactum de non petendo, the judex is bound, after all, by the praetorian instructions to give judgement for the defendant. In much the same way a person who is sued on a civil law claim may, by means of an exceptio, plead fraud (exceptio doli) or intimidation (exceptio metus) on the part of the plaintiff, or may plead a compromise (exceptio transactionis), or an oath sworn by him to the effect that the plaintiff has no claim (exceptio jurisjurandi). The civil law, on principle, excludes the consideration of all such circumstances. If the defendant were to plead that he had paid his debt, he would be entitled to a verdict ipso jure and would not need any exceptio at all; the intentio itself would require his acquittal, for the 'dare oportere' would no longer be true. But according to the principles of the civil law the obligation conveyed in the words 'dare oportere' is not affected by fraud, intimidation, &c. (cp. supra, p. 209). The truth of the intentio is not touched, and the defendant would have to be condemned. The praetor, however, helps him by inserting an exceptio, and thereby ordering the judge not to condemn, although, according to the civil law, he ought to condemn. In the same way therefore as the actio in factum and the actio utilis are instruments by means of which a condemnation is secured in contravention of the civil law, so the exceptio is an instrument by means of which an absolution is secured in contravention of the civil law. The exceptio is, in short, the medium through which effect is given to the equitable defences of the jus honorarium.

The same point of view is equally applicable to other cases which seem, at first sight, to present a somewhat different aspect.

The civil law, namely, while prohibiting certain juristic acts, did not always, at the same time, declare that an act concluded in spite of the prohibition should be null and void. For example, the

lex Cincia (204 B.C.) forbade certain kinds of gifts (supra, p. 212); but a gift made in contravention of the statute, was nevertheless valid by the civil law—the lex Cincia being thus what was known as a lex imperfecta (supra, p. 208). It was the praetor who gave effect to the prohibition contained in the lex Cincia by granting an exceptio legis Cinciae. Again the SC. Vellejanum (46 A. D.), while prohibiting the 'intercessio' of women (i. e. while prohibiting women from taking upon themselves the debt of a third party), did not declare any such intercessio void, but merely directed the magistrate to give effect to the prohibition in the exercise of his jurisdiction.[8] The praetor carried out the direction by granting to a woman who was sued in respect of her intercessio (e. g. in respect of a suretyship) the exceptio SC^i. Vellejani. In the same way we have an exceptio legis Plaetoriae (infra, pp. 294, 295), an exceptio SC^i. Macedoniani (§ 79), &c. In all cases of this kind the praetor acted on the specific instructions laid down by an authoritative organ of the civil law in regard to the particular form which his jus honorarium should assume (supra, p. 85). But the organ itself had done nothing more than lay down a rule of *public* law (in precisely the same manner as in the case adverted to above, p. 86, n. 4), i. e. it had not enunciated a legal rule operating directly on private law, but had merely bound the magistrate, who was charged with the administration of justice, to follow a definite course in the exercise of his imperium. Exceptiones of this kind are called by modern writers 'civil' exceptiones. By a civil exceptio, then, we mean an exceptio which is intended to give effect to a rule of the public civil law, an exceptio, therefore, which the praetor is *bound* by the civil law to insert in the formula. Nevertheless, even in the case of a civil exceptio the acquittal of the debtor is due, as far as private law is concerned, not to the jus civile, but to the jus honorarium. For according to the private civil law, the transactions referred to (the gift, the woman's suretyship, &c.) are perfectly valid, and it is only through the medium of the praetorian law that

[8] The words of the senatusconsultum ran: arbitrari senatum recte atque ordine facturos, ad quos de ea re in jure aditum erit, si dederint operam ut in ea re senatus voluntas servetur.—The praetor was therefore officially bound to insert the exceptio SC^i. Vellejani in the formula. It was not open to the defendant to waive the exceptio (cp. Mitteis, in *Jhering's Jahrbücher für Dogmatik*, vol. xxviii. p. 131 ff.).—A similar method was followed in the SC. Trebellianum and Pegasianum, infra, § 117.

the civil law principle effects the discharge of the debtor. That is the reason why in such cases the praetor is bound to give the judex explicit instructions not to condemn—why, in other words, the existence of an 'exception' must be stated—for in default of such instructions the civil law would compel the judex to condemn. Like other exceptiones, then, a so-called civil exceptio is a legal plea on the ground of which the defendant claims to be absolved, and which operates as a ground of discharge in virtue of the jus honorarium alone.

So far we have always taken the formula in jus concepta as our starting-point, the formula, that is to say, where a claim grounded on the civil law is stated as the condition on which the condemnatio is to take place, and where the relation subsisting between the condemnatio and the intentio affords an illustration of the relation between the praetor and the civil law. For where the condemnatio is unqualified, i. e. where there is no exceptio, there the praetor is in harmony with the civil law;[9] where the condemnatio is qualified by an exceptio, there the praetor is in conflict with the civil law.

Matters stood differently where the formula was in factum concepta, that is to say, where the condemnatio was made conditional on a mere question of fact stated in the intentio, e. g. on the question whether a patron had been summoned before the court by his freedman without the consent of the praetor. There the effect of an unqualified order to condemn is always to estop the defendant from making any defence—unless, of course, it be a denial of the fact itself. Even though he may have actually paid his adversary and thus, beyond all doubt, extinguished every claim that the latter may have had against him, nevertheless, if the condemnatio is unqualified, judgement is bound to go against him, provided only the truth of the fact with which the suit is concerned is established. If therefore the defendant wishes to plead payment, he must have an exceptio solutionis inserted, which would be impossible if the intentio were juris civilis. In an actio in factum,

[9] As far (that is to say) as the condemnatio is concerned. The intentio juris civilis itself, however, may have already undergone a modification, and the action may have been thereby converted from a civil law action into a praetorian actio utilis (p. 259 ff.). But even in an actio utilis, when it is an actio in jus concepta, the law referred to is the civil law (though in a modified form), so that, in such cases, an unqualified condemnatio always indicates the agreement of the praetor with the civil law to which he makes reference.

whatever the ground may be on which the defendant claims judgement, he must, in order to be able to plead such defence, reserve his right to do so by means of an express exceptio. Thus, where the intentio is in factum concepta, every defence must be pleaded by exceptio. The necessity for inserting an exceptio is here due, not to the material nature of the law (in other words, not to the legal force of the defence as such), but solely to the formal narrowness of the intentio in factum concepta. Where the issue is purely one of fact—where, that is, the question whether the defendant is to be condemned turns entirely on matters of fact—there the formula supplies the judex with no legal principles to guide him in arriving at a judgement. In the absence of such principles, all the legal rules which, in any concrete case, govern the relation between the fact—as the condition—and the condemnatio—as the thing conditioned—must be expressly laid before the judex in the form of an exceptio. In a formula in factum concepta the exceptio embodies all the reservations which the meagreness of the intentio entitles the judex to have set out for him by the praetor.

In its material sense—and it is only when coupled with an intentio in jus concepta that we can speak of an exceptio having a material sense—an exceptio signifies a plea which is good by the praetorian law, but bad by the civil law.

Of all the exceptiones the exceptio doli played the most important part in the development of Roman law. It had received the general form: si in ea re nihil dolo malo A^1. A^1. factum sit neque fiat (Gajus iv. § 119).[10] The exceptio, as thus worded, required the judge, in the first place, to take account of the dolus of which the plaintiff had been previously guilty, at the time, namely, when he concluded the juristic act. (This is the force of the perfect tense: factum sit.) So far, the exceptio doli was the same as the plea of fraud which we have already discussed (p. 210), a plea by which, as in the exceptio metus, pacti de non petendo, &c., the defendant alleged a single definite fact for the purpose of repelling the plaintiff. Hence the exceptio doli, when used in this manner, is usually called by modern writers the exceptio doli specialis. In the

[10] In this form the exceptio dates at least from the time of Labeo; v. Pernice, *Labeo*, vol. ii. p. 113.—Among recent works mention should be made of a most valuable treatise on the exceptio doli by Hugo Krüger, *Beiträge zur Lehre von d. exceptio doli* (1892), as to which see Erman, *ZS. d. Sav. St.*, vol. xiv. p. 237.

second place, however, the judge was also required, by the form of the exceptio doli, to take account of the dolus of which the plaintiff was now guilty, by the very fact namely of his bringing the action. (This is the force of the present tense: fiat.) And dolus of this kind occurs wherever a person institutes legal proceedings, knowing full well that, for some reason or other, his suit is inconsistent with good faith; wherever, in other words, the very act of commencing a suit constitutes a deliberate violation of the requirements of bona fides. Such would be the case, for example, if a person were to sue on a transaction which he had obtained from the defendant by intimidation, or if he were to sue the defendant in breach of an informal agreement not to sue (pactum de non petendo). In this way the exceptio doli may sometimes serve the purposes of an exceptio metus or exceptio pacti. But Roman jurisprudence did not stop there. An exceptio doli was declared to be available, not only where the plaintiff, by taking legal proceedings, was acting maliciously, but also wherever, as it was said, 'ipsa res in se dolum habet' (l. 36 D. de verb. obl. 45, 1), i. e. wherever the raising of the action constituted objectively a breach of good faith. The insertion of the exceptio doli in the formula was considered to empower the judge to take account of every single circumstance that would render the condemnation of the defendant substantially unjust. Hence modern writers usually call the exceptio doli, when employed in this manner, the exceptio doli generalis. The Romans (it should be observed) did not make any distinction between an exceptio doli generalis and an exceptio doli specialis, but used the term exceptio doli indiscriminately in either sense. In consequence of this development the exceptio doli came to be available in place of all other special exceptiones, operating as a kind of general reserve clause, which, without specifying the defence, enabled the defendant to set up in judicio any fact that, for any reason whatever, might seem calculated to secure a judgement in his favour. And—what was still more important—it was this breadth of scope that fitted the exceptio doli for becoming the instrument employed, both in the theory and the practice of Roman law, for effecting such modifications of the material law as equity seemed to require. The exceptio doli was accordingly used for the purpose of mitigating the harshness of the jus strictum that governed all transactions in which the resulting

obligation was strictly and literally interpreted (§ 76); for the purpose, in other words, of protecting the real meaning of a formal promise from the consequences of a mere literal interpretation, and of thus protecting the underlying economic relation—as where a man had given a promise on the erroneous supposition that he was under a legal liability—from the strict legal operation of a formal contract. And in the same way it was employed for giving effect to counter-claims either by means of a lien ('retentio')—where claim and counter-claim are not ejusdem generis (as e. g. where a defendant is called upon to deliver up some object, but claims compensation for moneys expended on such object)—or by means of a set-off ('compensatio'), where claim and counter-claim are ejusdem generis. Thus the exceptio doli came to be the exceptio of all exceptiones, which in the hands of the Roman jurists became a weapon that enabled the jus aequum to defeat the old jus strictum at every point.[11] Such was the rich and vigorous development the possibilities of which lay hidden in the meagre, briefly-worded clause inserted by the praetor as an exception to the order by which he directed the judex to condemn.

The exceptio by which the condemnatio is qualified may, in its turn, be qualified by a 'replicatio', or exception in favour of the plaintiff; and the replicatio again may be qualified by a 'duplicatio', or exception in favour of the defendant; the duplicatio again may be followed by a 'triplicatio', and so on.

Exceptiones are in their nature either peremptory ('peremtoriae', 'perpetuae') or dilatory ('dilatoriae'). Peremptory exceptiones—which constitute the majority—are based on facts which absolutely debar the plaintiff from bringing his action. Such exceptiones are exemplified by those mentioned above (pp. 276, 277). Dilatory exceptiones are exceptiones which do not absolutely prevent the plaintiff from suing, but only debar him from suing at this particular time (his claim being premature), or in this particular form (e. g. if he sues through an unqualified representative). In pleading an exceptio peremtoria, the defendant demurs to the action itself, in pleading on exceptio dilatoria he merely demurs to the particular manner in which the action is brought.[12] In the classical law, however, the effect of an exceptio is the same in either case. Even

[11] On the above subject v. Pernice, *Labeo*, vol. ii. p. 112 ff.
[12] Cp. Schultze, *Privatrecht u. Process*, p. 320.

where the exceptio is merely dilatory, its effect, if proved, is to discharge the defendant, not merely from the action as brought at that particular time or in that particular manner, but absolutely. The consumption of the right of action (pp. 253, 254) which resulted from the litis contestatio precluded the plaintiff from ever bringing the same action again.

pr. I. de except. (4, 13): Comparatae sunt autem exceptiones defendendorum eorum gratia cum quibus agitur. Saepe enim accidit ut licet ipsa persecutio qua actor experitur justa sit, tamen iniqua sit adversus eum cum quo agitur. § 1: Verbi gratia si metu coactus aut dolo inductus . . . stipulanti Titio promisisti, . . . palam est jure civili te obligatum esse; et actio, qua intenditur dare te oportere, efficax est: sed iniquum est te condemnari. Ideoque datur tibi exceptio metus causa, aut doli mali, . . . ad impugnandam actionem.

§ 9 eod.: Perpetuae et peremtoriae (exceptiones) sunt, quae semper agentibus obstant et semper rem de qua agitur peremunt: qualis est exceptio doli mali, et quod metus causa factum est, et pacti conventi, cum ita convenerit ne omnino pecunia peteretur. § 10: Temporales atque dilatoriae sunt, quae ad tempus nocent et temporis dilationem tribuunt: qualis est pacti conventi, cum convenerit ne intra certum tempus ageretur, veluti intra quinquennium; nam finito eo tempore non impeditur actor rem exsequi..... § 11: Praeterea etiam ex persona dilatoriae sunt exceptiones: quales sunt procuratoriae, veluti si per militem aut mulierem agere quis velit.

pr. I. de replicationibus (4, 14): Interdum evenit ut exceptio, quae prima facie justa videatur, inique noceat. Quod cum accidit, alia allegatione opus est adjuvandi actoris gratia, quae replicatio vocatur, quia per eam replicatur atque resolvitur vis exceptionis. Veluti cum pactus est aliquis cum debitore suo ne ab eo pecuniam petat, deinde postea in contrarium pacti sunt, id est, ut petere creditori liceat. Si agat creditor, et excipiat debitor, ut ita demum condemnetur: si non convenerit ne eam pecuniam creditor petat—nocet ei exceptio, convenit enim ita: namque nihilominus hoc verum manet, licet postea in contrarium pacti sunt; sed quia iniquum est creditorem excludi, replicatio ei dabitur ex posteriore pacto convento.

§ 54. *Actio Perpetua and Actio Temporalis. Tempus Utile.*

There were a number of actiones honorariae which the magistrate only granted within a prescribed period. The praetor would thus more especially decline to grant any penal praetorian action after

the lapse of an 'annus utilis', i. e. any action where the claim to a penalty was based, not on the civil law, but solely on the praetorian edict. Actions which had to be brought within a prescribed period of limitation were known as 'actiones temporales'. Such a limitation of the right of action implied at the same time a limitation of the right itself, because in all actiones honorariae the sole foundation of the plaintiff's right was the 'judicium dabo' of the edict, that is, the praetor's promise to grant an action, or rather (to put it more accurately) the praetor's promise to grant a formula and thereby set the ordinary legal procedure in motion. If the praetor expressly limited his promise to one year (intra annum judicium dabo), he thereby imposed the same limitation on the plaintiff's right. The expiration of the period extinguished the actio temporalis, and, with it, the right—the right, for example, to recover a penalty.

On the other hand, limitations of actions were on principle unknown to the civil law. Actiones civiles, as well as actiones honorariae which the praetor had not limited within any definite period, were called 'actiones perpetuae'. It was only in quite exceptional cases that civil law actions were barred after a certain time.[1]

The Emperors Honorius and Theodosius, however, moved by obvious considerations of convenience, enacted in 424 A. D. that all actions should be barred within a certain period. This period was fixed at thirty years in ordinary, at forty in some exceptional cases. If the plaintiff brings an action after the lapse of this period, he may be met with the plea of limitation (praescriptio temporis).

The former rules as to limitation of actions remained in force. Thus actiones perpetuae are henceforth actions which are barred within thirty or forty years; actiones temporales are actions which are barred within shorter periods.

A civil law right is founded, not on any promise to grant an action, but simply on the positive law, the granting of the action by the magistrate being merely the consequence of the right conferred by the positive law. Here the legal right begets the legal remedy. Thus, though the limitation of civil law actions which Theodosius II

[1] Thus the action de statu defuncti and the querela inofficiosi testamenti (§ 113, III) had to be brought within five years.

introduced operated to bar the action, it did not operate to extinguish the right.

It was in this sense that the later Roman law took the limitation of actions, even as applied to actiones temporales, and it was in the same sense that a uniform system of limitations of actions was developed in the law of the Corpus juris which has been received in Germany—a system in which the periods of limitation vary in length and operate, in all cases, to extinguish, not the right, but only the remedy.

The year fixed by the praetor for cases falling under his rules of limitation was the so-called annus utilis, i. e. a year in which only those days were counted on which legal proceedings could actually be commenced, in other words, those days on which the courts sat, and on which the intended defendant was known and could be actually sued, &c. The term 'tempus utile' is thus explained. Tempus utile means time in the judicial sense, in the sense namely in which only those days are counted which are open to judicial acts, i. e., in the classical period, to acts performed in the presence of the praetor.[2] The opposite of tempus utile is 'tempus continuum', i.e. time in which, on principle, every day is counted. In the above-mentioned limitations of actions to thirty (or forty) years, time is counted as 'continuum', in the sense we have just defined.

L. 35 pr. D. de O. et A. (44, 7) (PAULUS): In honorariis actionibus sic esse definiendum Cassius ait: ut quae rei persecutionem habeant, hae etiam post annum darentur; ceterae intra annum.

L. 1 D. de div. temp. praescr. (44, 3) (ULPIAN.): Quia tractatus de utilibus diebus frequens est, videamus quid sit experiundi potestatem habere. Et quidem inprimis exigendum est ut sit facultas agendi: neque sufficit reo experiundi secum facere potestatem, vel habere eum qui se idonee defendat, nisi actor quoque nulla idonea causa impediatur experiri. Proinde sive apud hostes

[2] Tempus utile occurs, in virtue of a rule of law, only where judicial acts (the commencement of an action, an application for bonorum possessio, § 110) come into question. In applying for bonorum possessio the petitioner invokes the aid of the praetor in his judicial capacity, though it was the invariable rule, as early as the classical period, that such an application could be addressed to the praetor anywhere (de plano) without any formal sitting of the court. In calculating the period in which application for bonorum possessio had to be made, it was consequently the rule (in the absence of other obstacles of a special kind) to count not only court days, but all days commencing with the day on which the applicant first obtained knowledge of his title to the inheritance.

sit, sive reipublicae causa absit, sive in vinculis sit, aut si tempestate in loco aliquo vel in regione detineatur, ut neque experiri neque mandare possit, experiundi potestatem non habet. Plane is qui valetudine impeditur ut mandare possit in ea causa est, ut experiundi habeat potestatem. Illud utique neminem fugit, experiundi potestatem non habere eum qui praetoris copiam non habuit; proinde hi dies cedunt quibus jus praetor reddit.

§ 55. *The Effect of an Action at Law.*

In every lawsuit there are two principal acts: first, the litis contestatio, the formulating of the legal issue (pp. 226, 253); secondly, the judgement, or decision of the legal issue.

I. Litis Contestatio.

The peculiar effect of the litis contestatio is that it results in the deductio rei in judicium, i. e. in the pendency of the matter in dispute. That is to say, once the issue has been formulated, the matter in dispute cannot be brought to trial a second time, but must be carried to a final decision on the basis of the issue as formulated in this particular suit. The litis contestatio marks the decisive exercise by the plaintiff of his right of action. Hence it follows, first, that the period of limitation of the right of action is not interrupted till the litis contestatio has taken place; secondly, that the litis contestatio consumes the right of action. The action cannot be brought over again: bis de eadem re ne sit actio. Any attempt to obtain a judicial re-hearing of the same question (eadem quaestio) would be met by the exceptio rei judicatae vel in judicium deductae.[1] Thirdly, it follows that the litis contestatio forms the basis of the judgement. The judgement refers back to the date of the litis contestatio. The plaintiff must have had the right he claims at the moment of the litis contestatio. On the other hand, if the plaintiff is successful, the judgement is to place him retrospectively in the same position as though it had been given in his favour at once at the time of the litis contestatio. That is why the judgement directs the restitution of mesne profits, the payment of damages, and so forth.

It was this peculiar effect of litis contestatio that suggested to the

[1] Cp. p. 254, note 2. The so-called negative function of the exceptio rei judicatae—its function, namely, to give effect to the consuming power of an action at law—is its main function. But, as is observed in the text under II (p. 286), the same exceptio *may* also be used—and this is called the positive function of the exceptio rei judicatae—for the purpose of giving effect to the contents of the judgement.

Romans a comparison between it and the 'novatio' or transformation of a liability (infra, § 80, II). Once the issue has been joined, what the plaintiff can claim from the defendant by means of his action is no longer the performance of the act originally due—for to allow that would be to allow a repetition of the same action—but merely the continuation of the proceedings that have been commenced: ante litem contestatam dare reum oportere, post litem contestatam *condemnari* oportere (Gajus III § 180). In consequence, moreover, of the principle of a money condemnation (p. 267), the original claim of the plaintiff is, in the classical law, transformed into a money claim. Finally, litis contestatio has the effect of converting a claim which, in itself, is not transmissible to the heir (e.g. the actio injuriarum) into a transmissible claim. The pendency of the cause, which is the result of the litis contestatio, has, as regards procedure, the effect of consuming and, at the same time, resuscitating the right which the plaintiff is seeking to enforce.

II. Judgement.

The peculiar effect of a judgement consists in its legal force. When no longer subject to revision on appeal, it operates like a statutory rule for the particular case adjudged upon.[2] A defendant, by pleading a previous judgement, is able not merely to frustrate the repetition of the same action, but also—and this is what is called the positive function of the exceptio rei judicatae—to rebut any subsequent claim directly conflicting with the decision contained in such judgement. If the judgement condemns the defendant to pay, or if the defendant makes a formal confessio in jure (supra, p. 56), such judgement, or confessio in jure—provided the latter is followed, where necessary, by a litis aestimatio (cp. l. 6 § 2 D. 42, 2)—entitles the plaintiff to proceed against the defendant by actio judicati. The actio judicati involves a condemnation in duplum as against a defendant who denies liability, and it results in execution, i.e. in the compulsory enforcement of the plaintiff's right.

III. Execution.

In the ancient law every execution was on principle personal (manus injectio, supra, p. 234 ff.), and resulted in the bondage of the debtor, so that the creditor might either sell him (trans Tiberim),

[2] Cp. Degenkolb, *Einlassungszwang und Urteilsnorm* (1877), p. 80 ff.; O. Bülow, *Gesetz u. Richteramt* (1885); A. Mendelssohn Bartholdy, *Grenzen der Rechtskraft* (1900).

or kill him (p. 51). The creditor's right to sell or kill his debtor was abolished by the lex Poetelia (313 B.C.). Nevertheless bondage for debt (operating, however, as a matter of fact, only in the form of imprisonment for debt) continued to be the civil law method of execution *par excellence*. When the person of the debtor (whom execution placed in the position of a slave in regard to his creditor) passed into the power of the creditor, the same fate befell his whole estate and probably also his whole family, i.e. the aggregate of those who were subject to his potestas. Thus every personal execution involved necessarily—though only indirectly—an execution against the debtor's property, because it went, in all cases, against the debtor's entire person and estate, quite regardless of the actual amount due. The aim of execution in the old times was not, as it is nowadays, primarily to satisfy the creditor, but rather to punish the debtor by allowing the creditor to attach the personality of the debtor with everything appertaining to it. The non-fulfilment of a valid legal obligation was regarded as an offence which ought to be punished. In every department primitive law exhibits the same tendency to express itself in the first instance in the form of penal rules.

The praetor was the first to grant direct execution against the property of the debtor. He did so by means of a so-called missio in bona, that is, by means of an order empowering such of the creditors as had applied to him for that purpose to take possession of the entire estate of the debtor. After the lapse of a definite interval, during which it was open to other creditors to join the number of those who had obtained the missio in bona, the latter proceeded to elect from among themselves a magister, or manager of the estate, who in due course sold the property *en bloc* (venditio bonorum).[3] In

[3] The effect of the praetorian missio in bona was to confer on the creditors who obtained it a *private* right to sell the entire estate of the debtor, and the magister was one of the creditors in question whom his co-creditors elected as their 'master' to exercise this right on their behalf. If after the election of the magister, but before the sale had been actually carried out, another creditor also obtained missio in bona, this other creditor (who of course had taken no part in electing the magister) ranked independently side by side with the magister, and had the same rights. The magister was merely the agent of the particular creditors who had elected him; he was in no sense a public officer entrusted by the praetor with the conduct of the bankrupt's affairs. The case was different if the praetor, instead of putting the creditors into possession, committed the management of the debtor's estate to a 'curator bonorum', whose duty it was to realize the estate in separate lots

consideration of his acquiring the assets, the purchaser of the estate (bonorum emtor) paid the creditors in possession certain percentages on their claims. The execution was therefore uniformly directed against the entire estate of the execution-debtor, and it made no difference whether the missio in bona had been obtained by all the creditors, or only by some of them, or even by a single creditor. Both in this circumstance and in the infamy which attached to the debtor in consequence of the missio in bona, we can trace the associations of the old personal execution, the debtor being regarded as having pledged to every one of his creditors not only his entire property, but also his honour.

Thus the creditor had the option of two kinds of execution: execution against the person of his debtor, according to the civil law, or execution against the property of his debtor, according to the praetorian law. In consequence of a lex Julia (probably not promulgated till Augustus) the debtor was enabled to exclude this option of the creditors by making a voluntary assignment of his property (cessio bonorum), in other words, by voluntarily bringing about an execution against his entire estate. If he adopted this course, the creditors had to rest satisfied with real execution of

and pay the creditors pro rata out of the proceeds. Under this system of selling the estate piecemeal the bankrupt was at no time dispossessed of his whole property, and he consequently escaped infamy. The creditors, again, were paid, not by the bonorum emtor, but—as was only fit and proper—by the debtor himself (through the medium, namely, of his curator), and if there was any surplus, the debtor got the benefit of it. This procedure, which was considered less dishonouring than venditio bonorum, was at first only employed in favour of senators in embarrassed circumstances, but afterwards its use became general. The modern idea of bankruptcy procedure as a compulsory procedure in execution, directed against the *entire* estate of the debtor and operating in favour of the whole body of creditors, has no place in the venditio bonorum, but is realized, to some extent, in the duties assigned to the curator bonorum. For the old magister was never anything more than a creditor acting exclusively in the selfish interests of himself and his electors, whereas the curator appointed by the praetor represented the principle of the *public* interest which requires that bankruptcy proceedings shall be conducted on a uniform plan and that, on the one hand, *all* the creditors shall obain an equitable satisfaction of their claims, and, on the other hand, no unnecessary damage shall be inflicted on the debtor. The Romans do not, however, seem to have carried the development of this principle to a complete conclusion; in other words, the curator never seems to have attained to the position of a public officer charged with the conduct of a State-regulated procedure in bankruptcy. Mention is made of a 'curator' *elected* by the creditors, but it is not clear what his legal position was. Degenkolb, *Magister und Curator im altrömischen Concurs* (Decanal Thesis, Leipzig, 1897).

the praetorian type, while on the other hand the debtor escaped infamy, and acquired the 'beneficium competentiae', i. e. the right, on execution, to retain so much of his property as was necessary for his bare subsistence (ne egeat), he being only condemned 'in quantum facere potest'.

In addition to this general execution against the debtor's entire estate, which the plaintiff could bring about by an actio judicati, the praetor developed another, a 'special' form of execution directed against separate portions of the debtor's property, the so-called pignus in causa judicati captum, in which the creditor was authorized to seize particular things belonging to the debtor by way of pledge. This procedure was resorted to in certain circumstances on the postulatio of the plaintiff according as the praetor, acting extra ordinem, judged fit. If the magistrate had decided, in a proceeding extra ordinem (§ 56), that the defendant was bound to restore or deliver up some definite object, a compulsory process, aimed directly at the surrender of that object, was similarly available, the defaulting debtor being threatened with a pecuniary mulct or, if necessary, with compulsion manu militari. In the later Empire the extraordinary procedure became the ordinary form of procedure, the result being that the form of execution employed, on principle, in the generality of cases was execution of that direct kind which went, not against the debtor's entire estate, but against particular things belonging to him (infra, p. 300). The penal effects of the old law of execution—viz. the infamy of the debtor and the destruction or, at any rate, the depreciation of the debtor's personality which resulted from his being each time dispossessed of his entire estate—had completely disappeared. The later law does not look upon the breach of a private law obligation as a penal offence. Henceforth execution in civil proceedings became what it is now, a procedure the sole aim of which is the satisfaction of the person entitled to sue.

§ 56. *The Procedure Extra Ordinem. Interdicta. In Integrum Restitutio.*

I. The Procedure extra ordinem.

The procedure extra ordinem (scil. judiciorum privatorum)[1] is

[1] Procedure extra ordinem means literally a procedure 'out of the (regular) order'. Matters tried extra ordinem were not tied to the time appointed for

the procedure in which no judex is appointed, in which there is, therefore, neither litis contestatio (supra, p. 226), nor judgement (sententia, supra, p. 227) in the proper sense of the term. The entire proceedings are conducted before the magistrate in jure who, after investigating the matter in person (causae cognitio), pronounces the decision himself (decretum, interdictum). The procedure extra ordinem—a procedure not per formulam, but per cognitionem—is the form of procedure in which the magistrate has occasion to give free play to his official power (imperium), and it signifies formally an administrative procedure as opposed to the regular judicial procedure with its concomitant appointment of a judex. In the ordinary procedure the coercive power of the magistrate is, on principle, kept out of sight, and the whole matter ends with the verdict of a sworn judge, the effect of which is merely to *declare* the right of the plaintiff in an unequivocal form—in the form, namely, of an indisputable money claim—so that, if the plaintiff wishes to obtain execution, he must bring a second action, the actio judicati. On the other hand, the whole machinery of the extraordinary procedure is calculated from the very outset to exhibit the coercive power of the magistrate (the imperium), and to ensure the enforcement of the magisterial will by multae dictio, pignoris capio, missio in possessionem, the physical interference of the magistrate's subordinate officers (manus militaris), and other means. In the ordinary procedure it is the power of the law, in the extraordinary procedure it is the sovereign power of the magistrate to which effect and expression are given.[2]

The decision of the magistrate in the procedure extra ordinem is, as we have already observed, called 'decretum' or 'interdictum'. The interdict procedure is therefore originally identical with the administrative procedure, and the interdict with the administrative decision of the magistrate.

Among the matters which the praetor was in the habit of settling by administrative means (i. e. by his interdict) we may instance the following: questions concerning public property, such as public roads, rivers, &c.; questions concerning property consecrated to the

the provincial assizes (the time of the conventus, the rerum actus), nor again to the order in which ordinary causes had to be entered for hearing (the 'ordo judiciorum'). Cp. Hartmann-Ubbelohde (*op. cit.*, supra, p. 225, note 1), p. 418 ff.

[2] Cp. Pernice, *ZS. d. Sav. St.*, vol. v. p. 29 ff.

gods (res sacrae), such as temples, altars, &c.; questions concerning burial grounds (res religiosae); disputes between neighbours; claims for maintenance; claims for the restitution of children or members of a household who were wrongfully withheld; disputes in building matters; disputes between landlords and outgoing tenants, and so forth,—all matters, in short, where the interests of public order were predominant. It was with a view to the same interests that disputes concerning possession were dealt with by interdict: disputes, that is to say, not as to the right to possess, but as to the actual possession itself, the disturbance or withholding of possession. The public interests required that the peace should be kept,[3] which was impossible if persons actually in possession were disturbed or ousted by sheer physical force. The praetor, therefore, interfered by administrative means (extra ordinem) and decided such disputes by his interdict.

II. The Interdict Procedure proper.

The decision of the magistrate acting extra ordinem soon ceased, in many cases, to constitute any real decision of the matter in dispute. It was often impossible for the praetor to investigate the actual facts of a case. He therefore contented himself with a statement of the principle on which the case should be settled; in other words, with a pronouncement, addressed to the parties, of the administrative rule which he (the praetor) approved.

To take an instance. A has granted B permissive possession ('precario') of some object, say, a piece of land, i. e. he has granted B possession on terms that B shall redeliver on demand. If B (the 'precario habens'), after demand made, refused to restore the property, A (the 'precario dans') could apply to the praetor in his administrative capacity as the guardian of public order, and claim that he (the praetor), acting extra ordinem, should, by his interdict, provisionally re-establish A's previous possession, without prejudice to any question of law involved in the dispute, as to who was owner, and so on. It is probable that originally the praetor inquired into the facts of the case himself and pronounced his decision accordingly: *Whereas* you, B, have received such and such a thing precario from A (the plaintiff), you must restore it to A. But it had gradually become impossible for the praetor each time actually to

[3] Pernice, *ZS. d. Sav. St.*, vol. xvii. p. 195 ff.

determine the facts of the case himself. Hence the material difference in the nature of his decision at a later time: *Whatever* you, B, have received precario from A (the plaintiff), you must restore to A (quod precario ab illo habes aut dolo malo fecisti ut desineres habere, qua de re agitur, id illi restituas; cp. l. 2 pr. D. de precario 43, 26). A decision of that kind may be pronounced by the praetor at once without any inquiry; nay, he may even formulate and publish it in advance in his album. The praetor's decision, therefore, which was formerly unconditional, is now merely conditional, and the interdict of the old type has become simply an abstract rule which, without determining the particular case in question, merely enunciates the general principle on which it ought to be decided and by which the parties must therefore be guided. The pronouncement which the praetor addresses to the parties is not a judgement, but a *direction*.

Such a direction published, at the instance of a party, by the praetor in his administrative capacity, for the express purpose that the parties concerned shall abide by it, is known as an interdictum, in the narrower and technical sense of the term. Interdict procedure therefore, now means that particular kind of extraordinary procedure which results in the pronouncement by the praetor, not of a decision, but of a direction.[4]

The parties, however, are naturally anxious to have their dispute decided. For this purpose the interdict procedure will have to be followed by further proceedings. As a rule the parties have recourse to a sponsio and restipulatio (cp. p. 255). That is to say, at the instance of the praetor they mutually promise one another a penal sum to be forfeited by the promisor if, on the one hand, he has contravened, or shall at any future time contravene, the direction expressly addressed to the parties by the praetor (i.e. the interdict), and if, on the other hand, the adversary has been challenged to a sponsio without just cause. The sponsio and restipulatio thus give rise to an action which is conducted in accordance with the

[4] The direction may require the restoration (interdicta restitutoria), or merely the production of some object, e.g. a will (interdicta exhibitoria), or again it may require an abstention (interdicta prohibitoria). Prohibitory interdicts are dealt with by Pfersche in his work, *Die Interdicte des römischen Civilprocesses* (1888). The author there points out that, on principle, prohibitory interdicts are the same in kind as the other interdicts, because, like the latter, they are conditional decisions.

ordinary civil procedure. The judgement in this action constitutes, at the same time, the judgement in the interdict proceedings, so that, when judgement has been given with regard to the penal wager, the winner is entitled not only to recover the penalty, but also to have the claim he put forward in the interdict proceedings satisfied by means of an arbitrium. Sometimes, however—viz. in cases of interdicta restitutoria or exhibitoria—an action is brought at once without any sponsio and restipulatio, the plaintiff, by formula arbitraria, demanding satisfaction of his claim (to a restitution or production) on the basis of the interdict itself. It is only in cases of prohibitory interdicts—that is, in cases where the adversary is not called upon to do any positive act (restituere or exhibere), but solely to abstain from doing something (e.g. from disturbing the plaintiff's possession), where therefore nothing but a penalty can be claimed for the violation of the order to abstain—that the procedure cum sponsione (and, consequently, cum poena) is, of course, the only available method.

Thus the interdict procedure now only serves the purpose of introducing the ordinary procedure with a judicium. It means a procedure in which the decision is based, not on a rule of law, but on an administrative rule laid down by the praetor, a procedure, therefore, which requires that, in each separate case, the administrative rule in question (the interdict, in the formal sense of the term) shall be expressly made known to the parties concerned. In reality, however, the interdict procedure in this its later form is nothing more than an actio, differing from an ordinary actio only in regard to the conduct of the proceedings in jure, the first step being the publication of the direction to the parties. By the time of Justinian all peculiarities of the interdict procedure have fallen into desuetude. The interdict has ceased to be a direction published, in each separate instance, for the guidance of the parties, and has come to be regarded simply as a rule of law of general validity giving rise to an actio ex interdicto—an action commenced in the ordinary way, but conducted in accordance with the procedure extra ordinem (§ 57).

Gaj. Inst. IV § 139: Certis igitur ex causis praetor aut proconsul principaliter auctoritatem suam finiendis controversiis interponit; quod tum maxime facit, cum de possessione aut quasi possessione inter aliquos contenditur; et in summa aut jubet aliquid fieri, aut

fieri prohibet; formulae autem et verborum conceptiones quibus in ea re utitur interdicta vocantur vel accuratius interdicta decretaque.

L. 2 pr. D. de precario (43, 26): Ait Praetor: QUOD PRECARIO AB ILLO HABES, AUT DOLO MALO FECISTI UT DESINERES HABERE, QUA DE RE AGITUR, ID ILLI RESTITUAS.

L. 1 pr. D. uti possid. (43, 17): Ait Praetor: UTI EAS AEDES QUIBUS DE AGITUR NEC VI NEC CLAM NEC PRECARIO ALTER AB ALTERO POSSIDETIS: QUOMINUS ITA POSSIDEATIS VIM FIERI VETO.

L. 1 pr. D. de liberis exhib. (43, 30): Ait Praetor: QUI QUAEVE IN POTESTATE LUCII TITII EST, SI IS EAVE APUD TE EST, DOLOVE MALO TUO FACTUM EST QUOMINUS APUD TE ESSET, ITA EUM EAMVE EXHIBEAS.

III. In Integrum Restitutio.

Where a person has suffered a legal prejudice by the operation of the law, and the magistrate, in the exercise of his imperium, rescinds such prejudice by re-establishing the original legal position, in other words, by replacing the person injured in his previous condition,—this act of rescission is called In Integrum Restitutio. Thus, whereas an action supplies a remedy against a wrong, in integrum restitutio supplies a remedy against the law itself, a remedy which is rendered necessary by the inability of the law to provide prospectively for the particular circumstances of every case. To a certain extent the law must always generalize: it must always, in some measure, leave the particular circumstances out of sight. The law, for example, declares that if I have made an agreement in a form which is legally binding, I must abide by the agreement and cannot withdraw. True, the law itself may create exceptions to such a rule by providing that certain special circumstances, which would render the application of the rule inequitable, shall be taken into consideration. Thus, the Roman civil law (the lex Plaetoria, about 186 B.C.) declared that, in exceptional cases, an agreement, though validly concluded, should nevertheless not be binding, if namely a person of less than twenty-five years had been fraudulently overreached (circumscriptus) by means of that agreement. Or again, the praetor, generalizing the exception created by the lex Plaetoria, announces in his edict that he will relieve any person (be he minor or major XXV annis) who has been fraudulently overreached from the legal consequences of his juristic act (supra, p. 210). It is in this manner that a 'jus singulare', a law which is an exception to the ordinary law (supra, p. 28), comes into existence, the particular circumstances being taken into account and the law, so to speak, rectifying itself.

But in order to avoid all injustice, it is not sufficient that the law should in this manner rectify itself. It is not enough for legislation, or quasi-legislation like the praetorian edict, to modify one general rule by another of an equally general character. In this way occasion arises for the praetor to use his imperium with a view to rectifying the law in given individual cases by virtue of his absolute sovereign power. This is what we mean by in integrum restitutio. The operation of the law has resulted in a legal prejudice, and the praetor, having personally inquired into the matter (causae cognitio), and acting on his own magisterial discretion, which enables him to consider all the actual facts of the case, issues his decree cancelling this prejudice. If the prejudice consists in the loss of a right of action (e.g. by limitation), the proceeding effecting the restitution ends with the granting of the actio, in other words, of the formula. The restitution thus granted by the praetor in jure is then followed by a judicium, the so-called judicium rescissorium, i.e. the trial and decision of the actio which has been thus restored (actio restitutoria or rescissoria). The 'judicium rescindens' itself, i.e. the proceeding which results in the restitution, is invariably conducted and concluded by the praetor himself.

There were two classes of cases in which restitution was granted: first, the restitutio minorum; secondly, the restitutio majorum.

(1) Restitutio Minorum (XXV annis).

The above-mentioned lex Plaetoria was the first to fix the limit of age at twenty-five years, and to clothe this limit with certain effects. Hence the description of majority as 'legitima' aetas. The lex Plaetoria itself gave the minor circumscriptus relief from any juristic act which he had concluded under the influence of fraud.[5] The praetor then, through his edict on dolus, extended the same protection against fraud to persons of full age (p. 210). But while thus practically doing away with the importance of the limit of twenty-five years, the praetorian edict, in a different sense, re-established it. The praetor namely proceeded to give minors a general promise of relief which was not confined to cases of fraud. He announced in his edict that he was prepared to examine any transaction concluded with a minor with a view to ascertaining

[5] It would seem that the lex Plaetoria (sometimes called the lex Laetoria) gave a private action ex delicto for fraud practised on a minor xxv annis. Cp. Pfaff and Hofmann, *Fragmentum de formula Fabiana* (Vienna, 1888), p. 38 ff.; Krüger, *ZS. d. Sav. St.*, vol. ix. p. 149, note 5.

whether it should be upheld or not. It was thus not only in cases of fraud, but in any case whatever where the practical result of a transaction was prejudicial to him, that a minor could hope to have the transaction cancelled by the help of the praetor (in integrum restitutio). The upshot of this practice was the development of the general rule that wherever a minor had, in any manner whatever, whether by a juristic act or otherwise, suffered a prejudice in consequence of his minority, he was entitled to in integrum restitutio.

L. 1 § 1 D. de minor. (4, 4): Praetor edicit: QUOD CUM MINORE QUAM VIGINTI QUINQUE ANNIS NATU GESTUM ESSE DICETUR, UTI QUAEQUE RES ERIT, ANIMADVERTAM.

(2) Restitutio Majorum (XXV annis).

There are circumstances in which a person of full age has as good an equitable claim to in integrum restitutio as a minor. This is especially the case when he suffers a prejudice through absence from home (restitutio propter absentiam). In consequence of his absence he may, for example, have lost a right of action by limitation, or some property through usucapio on the part of a third person. The first case dealt with from this point of view was that of a person being detained in captivity among a hostile people. Other cases of absence (e.g. rei publicae causa) were then treated in the same manner, and finally relief was afforded, on the same principle, in all cases where a person was, in any way, reasonably prevented from protecting his right.[6] Other grounds, besides absentia, which may entitle a person of age to in integrum restitutio are intimidation (metus), fraud (dolus), and error.

Thus in the case of minors the promise to grant restitution is a general one: the minor has only to appeal to his minority and to prove that he has been prejudiced in consequence of this minority. A person of full age, however, can only hope to obtain restitution in particular cases (absentia, metus, dolus, error), and he will have to prove each time that in his individual case the conditions necessary for a grant of restitutio are forthcoming.

§ 57. *The Procedure of the Later Empire.*

The ancient division of ordinary actions into jus and judicium had already lost part of its original significance in consequence of

[6] For the edict on the in integrum restitutio propter absentiam, v. supra, p. 87.

the development of the formulary procedure, since the effect of the formula had been to convert the judex into an organ and instrument not only of the civil law, but also of the law laid down by the praetor (pp. 256, 257). The judicium was now regulated by the same authority that controlled the proceedings in jure. On the other hand, the final consolidation of the edict by Hadrian (supra, p. 85) deprived the praetor and the praesides provinciarum (who exercised the ordinary jurisdiction in the provinces) of the jus edicendi in the old sense of the term. The praetor and the praeses were henceforth bound by the existing civil law and by the edict (as fixed by the will of the emperor) in the same way as the judex. The publication of the edict by the praetor had sunk to a mere form. The praetor was, in fact, stripped of his ancient imperium. Like the judex he became a mere instrument for applying the law, and his duties became more and more ministerial in proportion as, on the one hand, scientific jurisprudence developed and defined the contents of the existing law and, on the other hand, the imperial power, superseding all other agencies, appropriated to itself the function of developing the law.[1]

Thus the judex gradually became an official whose duty it was to assist the praetor, and, in the same way, the praetor became practically an official whose duty it was to assist the emperor. This change found formal expression from the reign of Diocletian onwards, the administration of the law in Rome being transferred from the praetor to an imperial functionary, the praefectus urbi. In the provinces the old distinction between senatorial and imperial provinces was abolished, and the praesides provinciarum were at the same time turned into imperial governors. Over them stood the praefecti praetorio with their substitutes, all of whom likewise exercised jurisdiction in the name of the emperor. The republican forms and magistracies were thus finally displaced by the monarchy with its system of dependent officials. The foundations of the old procedure had disappeared. The new procedure which was now gradually taking shape was modelled on the forms in which, till then, proceedings before the emperor had been conducted.

Ever since the establishment of the principatus it had been allowable to bring legal matters of any kind from any part of the

[1] Schultze, *Privatrecht u. Process*, p. 533 ff.

Empire before the emperor for decision. But whenever the emperor took upon himself to decide a case, he proceeded without a judex (privatus), and determined the matter either in person or through a delegate nominated by him for the purpose (e.g. the praetor urbanus or a praeses provinciae).[2] The necessity of appointing a judicium (a judex privatus) imposed a certain restriction on the discretion of the magistrate which did not exist in the case of the imperial power. The form of procedure which the emperor adopted was then imitated by the imperial officials. We observe that, towards the end of the third century, the praesides provinciarum were in the habit of proceeding extra ordinem in civil actions, i.e. they were in the habit of either giving judgement themselves or of delegating the whole cause to a deputy judge, a 'judex pedaneus'. This deputy judge (who is also called judex datus or judex delegatus) is now in form, as well as in substance, an *official* who acts in lieu of the magistrate; he is not merely entrusted, like the old judex privatus, with the conduct of the proceedings in judicio, but is deputed to hear and determine the whole cause, including the proceedings in jure. Like the proceedings before the praeses himself, the proceedings before this subordinate judge are extra ordinem; in other words, they constitute a procedure per cognitionem (p. 290), a procedure, that is, in which

[2] Thus Octavian delegated every year the 'appellationes' of litigant parties in the capital to the praetor urbanus; cp. Suetonius, Octav. c. 33, and on the same point J. Merkel, *Abhandlungen* (supra, p. 228, note 5), Heft ii. p. 46 ff.—In delegating the hearing of a cause the emperor often addressed to the judex delegatus a rescript containing a provisional decision of the legal question (si preces veritate nitantur). Hence the name 'action by rescript'. The application for the rescript (supplicatio, preces, libellus principi datus) produced the same effects as the litis contestatio. The rescript may thus be regarded as a kind of counterpart to the formula in the extraordinary procedure. But whereas it is the essence of the formula primarily to formulate the legal issue, it is the essence of the rescript primarily to decide it. And further, the judgement of the judex delegatus acting on the imperial rescript is the judgement of the emperor himself; the judgement of the judex acting on the praetorian formula is the judgement, not of the praetor, but of the appointed judex, however much the substance of his judgement may be determined by the praetor through the medium of his formula. An action by rescript therefore is an extraordinary action, and a judex delegatus, as such, is not a private individual, but the official representative of the imperial sovereignty.—A plea on the part of the defendant that the plaintiff, in applying for the rescript, has suppressed certain facts, is called a 'praescriptio subreptionis'; a plea that the plaintiff, in applying for the rescript, has alleged certain facts which are not true, is called a 'praescriptio obreptionis'.—As to the practical importance of the procedure by rescript for the development of Roman law, cp. supra, p. 108 ff.

the entire action is dominated by the magisterial causae cognitio. Diocletian, while sanctioning this form of procedure, insisted that, as a matter of principle, the provincial governors should decide disputes themselves, and should not depute the hearing of any cause to a judex pedaneus, unless they were actually prevented from trying it themselves.[3] A law of the Emperor Julian A.D. 362 (l. 5 C. de ped. jud. 3, 3) positively restricted the governors' powers of delegation to 'negotia humiliora'. It is obvious that the success which attended these proceedings on the part of the imperial officials was due, not to mere arbitrary power, but to a change in the legal views of the people in general. The officials were bound by the existing law, because they had ceased to enjoy the old imperium, and this fact stripped the original view, according to which a magisterial decision was not a judgement in the legal sense of the term, of all foundation, and definitely deprived the old division into jus and judicium of the significance which originally attached to it. The difference between a decretum and a sententia no longer existed. The decision of the magistrate (i.e. of the official) was now, like the decision of the judex privatus, a verdict, a sententia, and owed its force, not to the imperium, but to the law. It was, however, only by a gradual process that this reform of procedure was brought about. At the outset the superior magistrate followed the analogy of the old procedure, and, when delegating a case to a subordinate judge, gave him, as a rule, instructions similar to those contained in the old formula, which were to guide him in his decision of the legal question.[4] And in the same way the plaintiff adhered to the practice of petitioning the magistrate to issue such instructions to the subordinate judge—a proceeding which was called 'impetrare actionem'. But the restriction which a formula of this kind imposed on the subordinate judge was bound soon to be felt as irksome, since the practical foundation for any such restriction had long ceased to exist. It was not, however, till the fourth and fifth centuries respectively

[3] This is the meaning of l. 2 C. de pedaneis judic., 3, 3. Cp. Pernice in the *Berliner Festgaben* (supra, p. 92, note 8), p. 77, and in the *ZS. d. Sav. St.*, vol. vii. p. 103 ff.; Mommsen, *Röm. Staatsrecht*, vol. ii. part 2 (3rd ed.), p. 978.

[4] As in the imperial procedure by rescript (see supra, note 2). Cp. Gradenwitz, in the *Hermes*, vol. xxviii. p. 333; Mitteis, *ibid.* vol. xxx. p. 580; vol. xxxiv. pp. 99-101.

that this development was definitely brought to a close by means of two imperial constitutiones, one of which forbade the use of the 'hair-splitting juris formulae' (l. 1 C. de formulis sublatis 2, 57; A.D. 342), while the other, following up the first, provided that the defendant in an action should not be allowed to plead in defence that the plaintiff had failed to apply for an actio, i. e. for a formula (l. 2 C. eod.; A.D. 428). The process by which the formulary procedure was abolished was as slow and spontaneously progressive as the process by which, at an earlier stage, it succeeded in establishing itself.

The upshot of this course of development was that, in point of form, every action became, in its entirety, a proceeding in jure, conducted before the magistrate or his deputy (in other words, a proceeding 'per cognitionem'), and that, in point of form, the extraordinary procedure became the ordinary procedure. In its material aspect, however, the new procedure was nothing more than a machinery for *applying* the law, and retained therefore, to this extent, the features of the ancient judicium.

The formula ceased to be granted, and the litis contestatio was considered to have been carried out as soon as both parties had submitted their case to the magistrate (l. un. C. de lit. cont. 3, 9). The disappearance of the formula removed the necessity for a money condemnation and, with it, the peculiar narrowness which, as we have seen (supra, p. 267 ff.), continued to characterize even the classical procedure. The magistrate could now decree specific satisfaction, and since his judgement was the judgement of an official, his decree could be followed by specific execution supported by the power of the State. The practice of decreeing specific execution led to the development, on a general scale, of that system of 'special' execution by pignoris capio which enabled an individual creditor to obtain satisfaction, without having to resort each time to the circuitous method of first attaching his debtor's entire estate (supra, p. 289). On the other hand, the fact that the judgement was the judgement of an official resulted in the full development of that system of appeals the aim of which was to substitute, in place of the decision of the lower official, the decision of a higher one, and, in the last instance, the decision of the emperor himself as representing the highest court of appeal (p. 228, note 5).

The later procedure is thus characterized by greater freedom and

elasticity, more especially in regard to the proceedings on judgement and execution. At the same time we observe a tendency to utilize the practice of appealing to the imperial power for the purpose of establishing a uniform system of jurisdiction throughout the whole vast empire.[5]

The disappearance of the formula marked the disappearance of the last formal element of the old type and, with it, the disappearance of the last trace of the ancient magisterial sovereignty. Every judge was now a public officer in the modern sense of the term; every judgement was a judgement in the emperor's name, subservient to, and controlled by, the imperial authority. In a word, the procedure of the later Empire marks the first stage in the development of the modern action at law.[6]

[5] For further details on the procedure of the later Empire v. Bethmann-Hollweg, *Der Civilprocess des gemeinen Rechts in geschichtlicher Entwickelung*, vol. iii. (1866). For some recent contributions on points of detail v. Pernice, *ZS. d. Sav. St.*, vol. vii. part 2, p. 129 ff.; Kipp, *Die Litisdenuntiation* (1887); Baron, *Abhandlungen aus dem röm. Civilprocess*, vol. iii: *Der Denuntiationsprocess* (1887).

[6] Cp. Schultze, *op. cit.* (note 1) p. 562 ff.

CHAPTER II

THE LAW OF THINGS

§ 58. *The Conception of a Thing.*

THE Romans applied the word 'res' to anything that can form part of a person's property, and divided res, in this sense, into res corporales, or corporeal property (i.e. things, in the modern sense of the term), and res incorporales, or incorporeal property, such as a right of inheritance, jura in re aliena, rights and liabilities under an obligation. With us the term 'thing' is generally only used in the narrower and technical meaning of a res corporalis, a thing, in the legal sense, being a material object which is capable of human dominion and is intended for human dominion, intended, that is, for the satisfaction of the economic needs of men. The sphere of real rights* is thus determined. Things must necessarily be the *objects* of private rights. There can be no real right in respect of that which is not a thing, in respect, for example, of a mere fraction of a thing.

pr. I de reb. corp. (2, 2): Quaedam . . . res corporales sunt, quaedam incorporales. § 1: Corporales eae sunt quae tangi possunt, veluti fundus, homo, vestis, aurum, argentum, et denique aliae res innumerabiles. § 2: Incorporales autem sunt quae tangi non possunt, qualia sunt ea quae in jure consistunt: sicut hereditas, ususfructus, obligationes quoquo modo contractae.

§ 59. *The Different Kinds of Things.*

I. Certain things are prevented by a rule of law from being the objects of private rights. Such things are called 'res extra commercium'. Of res extra commercium we have three classes: res divini juris, res publicae, res omnium communes.

(*a*) Res divini juris include 'res sacrae', or things dedicated to the gods, such as temples and altars; 'res sanctae,' or things enjoying the special protection of the gods, such as the walls of Rome; 'res

* v. supra, p. 159, note.

religiosae,' or things dedicated to the dii Manes, i.e. burial grounds. (Cp. supra, p. 189.)

(*b*) The term 'res publicae', or public property, originally embraced everything owned by the populus Romanus (State property). Whatever belonged to the Roman people lay outside the pale of private law (p. 188). It was not till, in the first instance, communities, and then the State, had come to be regarded as (private) juristic persons, that things used for the purpose of carrying on the separate establishments of the State or community—e.g. things used for the maintenance of schools or for the paving and lighting of streets (cp. p. 195, note), things, therefore, by which the individual members of the State or community were only *indirectly* benefited—were admitted to rank with res privatae, and were, as such, treated as fit objects of ownership and commercial dealings in accordance with the rules of private law. Thus we find that, in Justinian's law, the term res publicae denotes, technically, only such public things as are 'publico usui destinatae', things, that is, which are devoted to the common use of all, things—such as public roads, public places, public rivers—which *directly* benefit all individuals alike, and are never, therefore, on principle, the objects of exclusive individual rights after the manner of private rights. Things of this kind continued even in Justinian's law to be classed as res extra commercium, i.e. they continued to be withdrawn from the domain of private law.

(*c*) Res omnium communes are the open air, the water of a natural stream, the sea, and the bed of the sea. Res communes are not, properly speaking, 'things' in the legal sense of the term, just as little as the sun, the moon, and the stars, or the atoms and ultimate particles of the naturalists, are 'things'. For the atmosphere of the earth, the ocean, and the flowing water of a natural stream (aqua profluens) are not, as such, susceptible of human dominion.

Gaj. Inst. II § 3: Divini juris sunt veluti res sacrae et religiosae. § 4: Sacrae sunt quae diis superis consecratae sunt; religiosae, quae diis Manibus relictae sunt. § 5: Sed sacrum quidem hoc solum existimatur quod ex auctoritate populi Romani consecratum est, veluti lege de ea re lata aut senatusconsulto facto. § 6: Religiosum vero nostra voluntate facimus, mortuum inferentes in locum nostrum, si modo ejus mortui funus ad nos pertineat. § 8: Sanctae quoque res, velut muri et portae, quodammodo divini juris sunt. § 9: Quod autem divini juris est, id nullius in bonis est.

§ 1 I. de rer. div. (2, 1): Et quidem naturali jure communia sunt omnium haec: aër et aqua profluens et mare et per hoc litora maris. Nemo igitur ad litus maris accedere prohibetur: dum tamen a villis et monumentis et aedificiis abstineat. . . . § 2: Flumina autem omnia et portus publica sunt, ideoque jus piscandi omnibus commune est in portubus fluminibusque. § 3: Est autem litus maris, quatenus hibernus fluctus maximus excurrit. § 4: Riparum quoque usus publicus est juris gentium, sicut ipsius fluminis; itaque navem ad eas appellere, funes ex arboribus ibi natis religare, onus aliquid in his reponere cuilibet liberum est, sicuti per ipsum flumen navigare; sed proprietas earum illorum est quorum praediis haerent: qua de causa arbores quoque in isdem natae eorundem sunt.

II. Res in commercio are all equally capable of being objects of private ownership. Among them the following distinctions are legally of importance:

(*a*) 'Res nullius', or ownerless things, are things which, as a matter of fact, belong to nobody, e.g. wild animals in a state of freedom. Ownership in them can be acquired by occupatio (infra, p. 317).

(*b*) 'Consumable things' (res quae usu minuuntur vel consumuntur) are things which are extinguished, and are intended to be extinguished, by use, e.g. food, money. Of such things there can be no usufruct (infra, p. 340), because a usufructuary is only allowed to use the thing which is the object of his usufruct 'salva rei substantia', i.e. so long as he keeps its substance intact.

Money is 'consumed' by being spent, or by being mixed with other money in a manner which renders it impossible to determine to whom the separate coins respectively belong. Thus, if I use another person's money to pay a debt or give a loan, the receiver of the money becomes the owner of it, not however in virtue of the delivery (traditio), but in virtue of the subsequent mixing of the money. Si nummi mixti essent—scil. with other money belonging to the receiver—ita ut discerni non possent, ejus fieri qui accepit (l. 78 D. de solut. 46, 3). After the mixture the 'pecunia aliena', as such, has disappeared. It has ceased to exist, as far as the former owner is concerned. It has been, economically speaking, appropriated by the receiver in just the same way as though it were food which had been consumed. But the circumstances attending the consumption may be such as to impose an obligation on the receiver to refund the money he received (infra, § 83, I *a*).

(*c*) 'Res fungibiles' (res quae pondere, numero mensurave constant) are things which, generally speaking, occur in ordinary dealings, not separately, but only in certain quantities. Such things are e.g. money, wine, grain, eggs, apples, cigars, &c., as opposed to, say, horses, books, plots of land. A person who owes res fungibiles is bound, as a rule, to supply, not individually determined things, but things determined only by reference to a class; that is to say, he is bound to supply a definite quantity of things of a definite quality, the separate things being reckoned, as between themselves, as equal. For the rule concerning res fungibiles is: tantundem ejusdem generis est idem.[1] It is the characteristic of a contract of loan that it can only arise by the delivery of res fungibiles (infra, p. 375).

(*d*) A 'divisible thing' is a thing which can be divided into several things of the same kind as the whole without thereby suffering any diminution in value. In this sense the following things are, as a rule, divisible: land, a given quantity of wine, a piece of cloth (as contrasted e.g. with a coat), and others. In Roman law, where the subject-matter of a partition suit is a divisible thing, the judge actually divides the thing, i.e. he separates it into several things; where it is indivisible, the joint interest must be severed by a different process (v. infra, p. 315).

The division of a thing into what are called 'ideal' parts—such as occurs, for example, in the case of common ownership—is not a real division at all. What it means is that several persons have common rights in one and the same thing, the rights being divided, but not the thing itself.

III. Res mancipi and Res nec mancipi.

The Roman division of things into res mancipi (mancipii) and res nec mancipi (mancipii), i.e. (literally) into things which could, and things which could not, be 'taken with the hand', was of considerable importance from an historical point of view. In primitive times the hand (manus; Old German: 'munt') was the symbol of the

[1] In a transfer of res fungibiles, as e.g. in a sale of grapes, apples, or eggs, the separate things are treated, without distinction, as equal, even when they are not, as a matter of fact, precisely identical. Thus things which 'numero constant' are all counted as equal (it is this that constitutes the essence, legally speaking, of 'adnumerare'), and the like principle applies to cases of weighing out (adpendere) and measuring out (admetiri). Cp. Karlowa, in Grünhut's *ZS. für Privat- u. öffentliches R.*, vol. xvi. (1889) p. 411.

separate power of the individual, the symbol, in short, of separate ownership. The res mancipii of the earliest times were the things that could be held in separate ownership (p. 37). During the historical period the expression 'mancipium' came to be applied to the formal legal act of 'taking with the hand', in a word, to the mancipatio, or solemn sale of the early law (p. 48). Henceforth res mancipi (mancipii) were the things that admitted of mancipatio (the 'purchasable things of value' in the sense of the jus civile), and res nec mancipi (mancipii) were the things that did not admit of mancipatio. It was only res mancipi that could be alienated by a mancipatio, or formal sale (§ 11), and it was only therefore in the case of res mancipi that the peculiar effects incident to mancipatio came into play. In other words, it was only where res mancipi were concerned that the alienee acquired the so-called quiritary, or full Roman ownership, and the alienor, the mancipio dans, was bound by a warranty of authority rendering him liable to an actio auctoritatis. And, conversely, res mancipi could only be acquired by a solemn juristic act of the civil law, such as mancipatio or its equivalents (infra, § 62), and never by a mere formless act of the jus gentium without any accompanying solemnities. The res mancipi represented, in the historical period, the privileged things of early Roman law, the things which were regarded as constituting the staple of the farmers', and, at the same time, of the nation's property. All dealings with things of this kind were necessarily a matter of public interest, and could not therefore be effected without publicity and the sanction of the community as represented either by the five witnesses or by the magistrate. And this same view of res mancipi being national property further resulted in what was perhaps, for the oldest times, the most important rule of all, the rule, namely, that no alien should be allowed to acquire ownership in such things. Every alien (peregrinus), as such, was shut out from the use of the juristic acts of the specifically Roman civil law, including, therefore, mancipatio. Consequently no alien could become owner of a res mancipi, unless indeed he belonged to the privileged class to whom the jus commercii had been granted (supra, pp. 66, 173). As for the movable res mancipi, the practical effect of their being ranked as res mancipi was to prohibit their removal beyond the confines of the Roman State. And the fact that the 'fundus Italicus' (which was originally, doubtless, only land actually

within Roman territory) was a res mancipi, meant that, on principle, no one but a Roman citizen could own landed property in Rome (and afterwards in Italy). Res mancipi, then, were things the alienation of which was hampered with certain restrictions on account of the public interests.

The following things were res mancipi according to the classical Roman law: (1) the fundus Italicus. The provincial soil, on the other hand, was owned by the Roman people; in the eye of the law, therefore, it was ager publicus and, as such, incapable of genuine private ownership (cp. p. 188); (2) rural servitudes, i. e. rights annexed to a landed estate in Italy (infra, pp. 342, 343); (3) slaves; (4) four-footed beasts of draught and burden. The list of res mancipi thus comprises the principal appendages, movable and immovable, of an old Italian farm.[2]

GAJ. Inst. II § 19: Res nec mancipii ipsa traditione pleno jure alterius fiunt. § 22: Mancipii vero res sunt quae per mancipationem ad alium transferuntur; unde etiam mancipii res sunt dictae.

ULP. tit. 19 § 1: Omnes res aut mancipii sunt aut nec mancipii. Mancipii res sunt praedia in Italico solo, tam rustica, qualis est fundus, quam urbana, qualis domus; item jura praediorum rusticorum, velut via, iter, actus, aquaeductus; item servi et quadrupedes quae dorso collove domantur, velut boves, muli, equi, asini. Ceterae res nec mancipii sunt; elefanti et cameli, quamvis collo dorsove domentur, nec mancipii sunt, quoniam bestiarum numero sunt. § 3: Mancipatio propria species alienationis est rerum mancipii.

§ 60. *Real Rights.*

Real rights are those private rights which confer an immediate power of control over a thing. A person who has a real right is entitled, by virtue of that right, to deal with a particular thing *himself*. Real rights belong to the category of 'absolute' rights, or rights available as against everybody, because their effect is simply to empower the person in whom they vest to act in a particular

[2] Jhering thinks it probable (see his *Jahrbücher für Dogmatik*, vol. xxiii. p. 204, note 1) that in the early law, wherever res nec mancipi were concerned, a simple 'meum esse' was possible, without the addition of 'ex jure Quiritium', and that rights over res nec mancipi were protected, not by means of vindicatio (which presupposed quiritary ownership), but solely by means of actiones furti.

manner.[1] Every one is accordingly bound to respect my right in the thing, such as it is, whether it be ownership or some other right. My right excludes every one from the use and disposition of the thing who has not, himself, some special right available as against me, for example, a right as lessee or usufructuary.

Opposed to real rights are the rights we have called (supra, p. 159) 'obligatory rights' * (§ 73). Whereas a real right entitles me to act myself, an obligatory right—e. g. a right under a contract of hire—only entitles me to require a particular *other* person to act, viz. the debtor (in our example the lessor). An obligatory right as such is accordingly only available as against a single person, namely, the debtor. If I am entitled (by virtue, say, of a right of usufruct) to use a particular piece of land, if, that is, I am entitled to appropriate the fruits of the land, and so forth, by *my own act*—I have a real right in the land, a right of immediate control over a material thing. But if (as would be the case with a lease of land in Roman law) I am only entitled to require a particular other person (the lessor) *to allow* me to use the land, if, that is, my right is merely a right to an act on the part of this other person—in that case I have only an obligatory right. In the former case I have a right *in the thing*, a power over the thing which holds good as against every one; in the latter case I have only a right to require a particular *person* to act. A general right to go across the land of another (a right of way) would be a real right; a right to require some particular owner of the land to let me go across would be an obligatory right. An obligatory right only enables me to exercise a control over a thing through the medium of another person's act (the act, namely, of the debtor); a real right entitles me to act

[1] Any right that entitles a person to act *himself*—e. g. a right of control based on family law, a patent right, a copyright—is an absolute right, and absolute rights form, as such, the antithesis to 'obligatory' rights. A real right is an absolute right over a material *thing*.

* *Translator's Note.* The term 'obligatory right' is used throughout as an equivalent for the German 'Forderungsrecht' ('obligatorisches Recht'). Forderungsrechte are a particular kind of rights in personam, such namely as arise under an obligation, whether under a contract, a quasi-contract, a delict, or a quasi-delict. Forderungsrechte and rights in personam are therefore by no means co-extensive. There are a great many rights in personam that are not Forderungsrechte. For example, rights in personam which are based on family relations (such as the right of a husband to require his wife to give up the custody of a child) are not Forderungsrechte. In the absence of any recognized English equivalent the term 'obligatory right', though open to obvious objections, must serve.

myself, and thereby effects an immediate enlargement of my powers as against everybody. The essence of a real right lies in the fact that it confers a free power to deal with a thing by one's own acts.

The fullest of all real rights is Ownership.

Opposed to ownership we have the rights over the things of others (jura in re).

I. Ownership.

§ 61. *The Conception of Ownership.*

Ownership is a right, unlimited in respect of its contents, to exercise control over a thing. The difference, in point of conception, between ownership and the jura in re aliena is this, that ownership, however susceptible of legal limitations (e. g. through rights of others in the same thing), is nevertheless absolutely unlimited as far as its own contents are concerned. As soon therefore as the legal limitations imposed upon ownership—whether by the rights of others or by rules of public law—disappear, ownership at once, and of its own accord, re-establishes itself as a plenary control. That is what is sometimes described as the 'elasticity' of ownership.

§ 62. *The Acquisition of Ownership.*
Historical Introduction.

The pre-Justinian law on the acquisition of ownership distinguished between acquisitiones civiles and acquisitiones naturales.

The acquisitiones civiles were the modes of acquisition recognized by the jus civile; in other words, the modes of acquisition peculiar to Roman law. The common elements in all these modes were publicity and solemnity. The solemnity consisted in the use of certain prescribed words and ceremonies; publicity was obtained by the participation, in some form, of the community, either through the medium of five witnesses, representing the five classes of the Roman people, or through the medium of the magistrate. The acquisitiones civiles were as follows:

(1) The Mancipatio, or formal sale, carried out in the presence of five witnesses and a libripens (supra, pp. 48, 49), and—closely

connected with mancipatio—the Legatum, or solemn legacy in a mancipatory will (infra, § 112).

(2) A magisterial Addictio, or award. Such an addictio might be pronounced either on the ground of a confession on the part of the defendant in an in jure cessio (i. e. in a fictitious vindicatio brought for the purpose of effecting a transfer of ownership, supra, p. 56), or on the ground of a sale by public auction (e. g. of booty of war, venditio sub hasta); or, again, it might be pronounced for purposes of an 'assignatio', or magisterial grant of ager publicus; or, finally, it might take the form of an 'adjudicatio', an award made by the judex in a judicium legitimum for the purpose of deciding a partition suit (infra, pp. 315, 316).

The acquisitiones naturales were the modes of acquisition recognized by the jus gentium. They had no element of solemnity or publicity, and the legal right (whatever it might be) was acquired, as a rule, through the medium of possession. The most important forms of natural acquisition were Traditio and Occupatio.

These different modes of acquisition were supplemented by Usucapio, or prescription, which was itself a form of civil acquisition, because its development was shaped by rules peculiar to Roman law (infra, p. 319 ff.).

The difference in the modes of acquisition was connected with a difference in the things themselves. The rule was that res mancipi (supra, p. 306) could only be acquired in full Roman ownership (dominium ex jure Quiritium) by civil modes of acquisition. According to the civil law ownership could not be acquired in a res mancipi by mere traditio or occupatio. But towards the close of the Republic the praetor intervened to reform the civil law in this respect. He declared that, where a res mancipi had only been informally sold (or otherwise alienated) and delivered, he would nevertheless protect the alienee and present possessor by means of an exceptio rei venditae et traditae, if the alienor (whose dominium ex jure Quiritium was not, of course, affected by the transaction according to the formal civil law) brought an action to enforce his ownership. The effect of the praetor's intervention was to render the dominium ex jure Quiritium (which on an informal alienation remained in the alienor) worthless as against the alienee. And, conversely, if a person who had acquired a res mancipi in an informal manner lost possession of the thing, the civil law would

not allow him to sue for its recovery by vindicatio. For having acquired it informally, he was not owner. The praetor, however, granted him the so-called actio Publiciana in rem (infra, § 66), and thereby enabled him, in point of fact, to assert his right as effectually, in all essentials, as if he had really been the owner of the thing. The praetor, in short, set aside the ownership of the civil law (quiritary ownership), and opposed to it what was practically a different kind of ownership, namely praetorian ownership; and though the praetorian title did not make the alienee formal owner, nevertheless it operated, by means of the exceptio and actio just mentioned, to make the thing, for all practical purposes, part of the alienee's property. Hence property held in praetorian ownership was said to be 'in bonis' ('bonitary ownership'). Bonitary ownership may also be acquired in res mancipi by natural modes of acquisition.

Thus, by means of his edict, the praetor converted the ownership of the old civil law into a bare form, the 'nudum jus Quiritium'. As far as the praetorian law was concerned, the division of things into res mancipi and nec mancipi and, in the same way, the division of modes of acquisition into civil and natural, had ceased to exist.

The civil law, however, retained the old distinctions, and the classical law still rests on the assumption of an antithesis between dominium ex jure Quiritium and in bonis esse. The development of this branch of the law was not brought to a final close till Justinian, who abolished quiritary ownership, and declared that praetorian ownership (which was, in reality, the only ownership in practical existence) should be deemed formally, as it was in fact, the only kind of ownership—the natural modes of acquisition being, of course, alone of importance in regard to such ownership. There was now but one kind of ownership and one system of modes of acquisition, the system, not of the old jus civile, but of the jus gentium. In the law of Justinian concerning the acquisition of ownership the formal antithesis has lost all significance, and the only antithesis of importance is one based on the nature of the acquisition itself, the antithesis, namely, between 'derivative' and 'original' modes of acquisition.

§ 63. *The Acquisition of Ownership.*

A. Derivative Acquisition.

When the material goods of the world have been distributed, the normal mode of acquiring ownership will be that I acquire ownership *from another person.* This other person is my 'auctor', my predecessor in title, my 'warrantor'. I succeed to his ownership. I only acquire ownership if my auctor was really owner himself. It is in this that the essence of a 'derivative' acquisition of ownership consists: it is a form of 'singular succession', i. e. of succession to the right of another.

A derivative acquisition of a right is an acquisition which depends on the existence of the right of a certain other person: the auctor. Of derivative modes of acquisition there are three in Justinian's law: Traditio, Legatum, Adjudicatio.

I. Traditio.

Traditio consists in a transfer of possession accompanied by an intention to transfer ownership. In Roman law ownership—whether in movables or immovables—is never acquired by mere consensus (e. g. by a contract of sale or a promise of a gift), but only by an actual transfer of possession. It is sufficient if the possession transferred is 'juristic' possession, but it must not be less than juristic possession. Juristic possession, however (as we shall see presently, § 67), does not necessarily mean immediate control over the thing possessed. Ownership can pass without any transfer of what is called detention, i. e. of immediate physical control of the thing; it is not necessary, in other words, that the change of possession should be outwardly visible. The Roman traditio does *not* require corporeal delivery. It can sometimes be effected by a simple declaration. Thus in the case of what is called constitutum possessorium, where one person (A), with the intention of transferring his ownership in a thing to another (B), declares that he will hold the thing for B—under a contract of hire from B, for example—A's declaration is sufficient to effect a traditio. And in the converse case of a 'brevi manu traditio', if it is agreed that B shall purchase from A a thing which he (B) already has in his actual control—under a contract of hire, for example—a corresponding declaration by A that B shall henceforth hold the thing

(which is already under his control) as his own, is enough to constitute a traditio.[1]

Both in constitutum possessorium and in brevi manu traditio a change of ownership is seemingly brought about by a mere declaration of consensus. But the explanation is that the declaration does not merely state that the intended transferee shall henceforth be owner, but also, at the same time, effects a change in the control of the thing, a change, that is, in the actual possession of the thing, in a word, a change in the *juristic* possession; and it is only through the medium of this change of possession that the transfer of ownership is accomplished. The hirer, by purchasing the thing he had hired (brevi manu traditio), acquires a different *power* over the thing from that which he had before. Conversely, the vendor who hires the thing he has sold (constitutum possessorium), loses the power he previously had over the thing in favour of the purchaser. There is no exception to the rule that traditio can never pass ownership, unless there be both an agreement concerning the transfer of ownership, and an execution of that agreement by means of a transfer of the (juristic) possession.

On the other hand, it is of course also a rule that ownership can never pass by the bare delivery of a thing—as where a thing is delivered for safe custody or by way of loan for use—a bare delivery being, legally speaking, no traditio at all. In order to be a traditio in the legal sense, the delivery must be accompanied by an intention to transfer ownership, which intention is expressed in the so-called causa traditionis, i.e. in a juristic act concluded either before or simultaneously with the traditio: a contract of sale, for example, or a promise of a gift. In the case of a sale, however (where, as usual, ownership did not pass by virtue of the contract as such, but only by the delivery of the thing sold), it was a rule of Roman

[1] Constitutum possessorium and brevi manu traditio are the two cases where a traditio is effected by a change of juristic possession without any change of detention. Constitutum possessorium is a traditio by a person who continues to have detention even after the traditio, in other words, by a person who sells or otherwise alienates a thing, but retains the immediate control of it by virtue, say, of a contract of hire, or as a usufructuary, or mandatary, or depositary, or what not. Brevi manu traditio is the traditio of a thing to a person who already has detention of it, in other words, to a person who already has immediate control of the thing—by virtue, say, of a contract of hire or depositum. In either case there is a change of animus (§ 67) and, with it, a change of juristic possession.

law that traditio should only pass ownership, if the price were paid or credit were given.

L. 20 pr. D. de A. R. D. (41, 1) (Ulpian.): Traditio nihil amplius transferre debet vel potest ad eum qui accipit quam est apud eum qui tradit. Si igitur quis dominium in fundo habuit, id tradendo transfert, si non habuit, ad eum qui accipit nihil transfert.

L. 20 C. de pact. (2, 3) (Diocletian.): Traditionibus et usucapionibus dominia rerum, non nudis pactis transferuntur.

L. 31 pr. D. de A. R. D. (41, 1) (Paulus): Nunquam nuda traditio transfert dominium, sed ita si venditio aut aliqua justa causa praecesserit propter quam traditio sequeretur. Cp. § 41 I. de rer. div. (2, 1), cited supra, p. 49, n. 2[a].

There was something informal about the traditio of Roman law, especially as it could be carried out without any corporeal delivery. It was well adapted to meet the requirements of the traffic in movables, the requirements, in other words, of ordinary commercial intercourse where simple, easy modes of transfer are a matter of practical necessity. As might have been expected, it was a product of the jus gentium—the old jus civile having made the farm of a Roman burgher (with its necessary appendages) a res mancipi and, as such, incapable of traditio—and the victory of traditio over mancipatio meant that henceforth immovable property should, for purposes of the law of things, be treated as though it were movable. The more recent development of the law (which has now been completed for the whole German Empire by the German Civil Code) has given effect to the ideas of the older German law by reverting to the principle of a separate treatment of land, the rule being that ownership in land can only be transferred with certain solemnities, viz. by a formal agreement (Auflassung) followed by an entry in the land register (Grundbuch). At present therefore ownership passes by simple delivery only in the case of movables, and in this sense modern law may be said to have raised land once more to the rank of a res mancipi.

II. Legacy.

A legacy is a derivative mode of acquiring ownership in so far as, according to Roman law, a testator is able, by his last will, directly to convey his property in ownership to another person in the form of a legacy. The legatee need not actually take possession

of the thing, for as soon as his right to the legacy becomes enforceable (dies legati venit), he becomes at once, ipso jure, without any act on the part of the heir, owner of the thing which the testator has directly bequeathed to him in ownership, provided only—and this is the reason why the acquisition is derivative—that the testator himself was the owner or, at any rate, had power to dispose of the ownership. Infra, § 115.

III. Adjudicatio.

Adjudicatio is the award of a judge in a partition suit. The common use of common property—as where several children are co-heirs of their father—does not always suit the interests of the co-owners. A partition may be effected amicably, by agreement. Failing this, a suit for partition becomes necessary. The object of partition proceedings is to convert co-ownership into sole ownership for the purpose of separating the co-owners. This may be done either by physically dividing the thing, i.e. by dividing it into several things, and awarding to each of the previous co-owners sole ownership in one of the new things;[2] or it may be done by awarding to one of the co-owners the whole thing in sole ownership, subject to a duty on his part to pay pecuniary compensation to the other co-owners.[3] In both cases the object is to effect a transfer of ownership, a transfer, namely, of the co-ownership to which the other condomini were entitled in the same thing. This transfer, which converts the person in whose favour it is effected into a sole owner, may, as we said, take place without any judicial proceedings, if the co-owners come to an agreement with one another on the matter. In that case traditio is required, i.e. the co-owners must mutually transfer possession to one another. But if an amicable arrangement fails, the transfer can be brought about by legal proceedings, viz. by a partition suit. In that case it is accomplished by the verdict of the judge (judex), the award or adjudicatio, which operates to change ownership without transferring possession, provided only that the other party to the suit was really a co-owner. The judicial adjudicatio transfers the co-ownership of one litigant to the other. My adversary in the suit, whose right of ownership the judge awards to me, is my auctor. Thus, like the preceding

[2] This can only be done with 'divisible' things, supra, p. 305.
[3] This is what happens in the case of 'indivisible' things.

modes of acquisition, adjudicatio is derivative, because it depends on the auctor's right of ownership.[4]

It is hardly necessary to point out that an adjudicatio, or judicial award in a partition suit, must not be confounded with a judgement in an action claiming ownership. The result of the judgement in such an action is that the plaintiff is acknowledged to be the owner as against the defendant—the non-owner—who had been withholding the property from him. The force of a judgement in a rei vindicatio is purely declaratory, declaratory, namely, of a pre-existing right, and its only effect is to debar the defendant from further disputing the plaintiff's right by legal proceedings, the plaintiff being entitled to meet him with the exceptio rei judicatae (supra, p. 286). But the force of an adjudicatio in a partition suit is (in Roman law) to *constitute* a right. Its effect is to invest me with a right of ownership which I had not before, viz. the co-ownership of my adversary, the condominus; the result being that I, who was only co-owner before, am now converted into a sole owner. The adjudicatio of Roman law was accordingly a mode of *acquiring* ownership, like traditio, &c.; a judgement in a rei vindicatio, on the other hand, was not a mode of acquiring ownership, but only a mode of protecting a right of ownership previously acquired from a different source.

§ 7 I. de off. jud. (4, 17): Quod autem istis judiciis (divisoriis) alicui adjudicatum sit, id *statim* ejus fit cui adjudicatum est.

§ 64. *The Acquisition of Ownership.*

B. Original Acquisition.

An 'original' acquisition of ownership is a mode of acquisition which operates, of its own force, to create a new right of ownership, which new right is accordingly independent of the ownership of any

[4] In the German Civil Code neither legacy nor judicial award in a partition suit (adjudicatio) finds any place as a mode of acquiring ownership. According to § 2174 of the Code the effect of a legacy is merely to impose an obligation on the person charged with it; it never operates of its own force to transfer ownership in a thing. And according to §§ 752 and 753 joint ownership must always be severed by the act of the joint owners themselves (whether by actual partition or sale); that is to say, the judge in a partition suit orders the joint owners by his judgement to carry out the partition, but he does not (as in Roman law) himself *effect* the severance of the joint rights by means of his award.

definite third person. A person who acquires by an original mode has no auctor.

I. Occupatio.

Occupatio is the most primitive of all modes of acquisition. It consists in the taking possession of a thing which belongs to nobody, with the intention of becoming owner of it. Res nullius occupanti cedit. The following may be objects of occupatio: wild animals, shells or stones on the sea-shore, derelicts, and so forth.

Derelictio is the opposite of occupatio. It occurs where a person abandons the possession of a thing with the intention of abandoning the ownership of it, as where he throws away the peel of an orange after eating the orange. The effect of derelictio is to make the thing a res nullius the moment the abandonment of possession is physically complete. Any one may therefore 'occupy', and acquire ownership in res derelictae.

There is of course a difference between derelict property and lost property. When we lose property, we part with it involuntarily. It is only the actual control of the thing that we lose, not the ownership of it. The thing is not a res nullius, but a res alicujus, and does not therefore admit of occupatio. The finder, so far from becoming owner of the thing, is bound, not only to keep and preserve it, but also to do what in him lies (e.g. by reporting his find to the police) to have the thing restored to its owner.

On the other hand, however, treasure trove ('thesaurus') is treated as a res nullius. Thesaurus, in the legal sense, is an object of value that has been hidden for a very long time, so that the owner is at present unknown. Half the treasure goes to the finder (the 'occupans'), the other half to the owner of the land in which it was found.

As to hostile property, the rule in Roman law was that it admitted of occupatio, as soon as it came within Roman territory, but that, when it returned to the enemy's country, it reverted at once by the jus postliminii to its former owner. And, conversely, Roman property which returned from the hands of the enemy to Roman territory reverted at once to its Roman owner.

§ 12 I. de rer. div. (2, 1): Ferae igitur bestiae et volucres et pisces, id est omnia animalia quae in terra, mari, caelo nascuntur, simulatque ab aliquo capta fuerint, jure gentium statim illius esse incipiunt. Quod enim ante nullius est, id naturali ratione occupanti

conceditur. Nec interest feras bestias et volucres utrum in suo fundo quisque capiat an in alieno. Plane, qui in alienum fundum ingreditur venandi aut aucupandi gratia, potest a domino, si is providerit, prohiberi ne ingrediatur.

§ 18 eod.: Item lapilli, gemmae, et cetera quae in litore inveniuntur jure naturali statim inventoris fiunt.

II. Usucapio.

By usucapio, or prescription, we mean the acquisition of ownership by continuous possession.

Usucapio constitutes one of the limitations which ownership is compelled to impose on itself in the interests of its own safety.

All security would cease, if a right of ownership could be asserted, without any limitation, for all time to come. There must be some moment at which the previous owner ceases to be owner, as against the present bona fide holder, and at which the bona fide holder becomes legally as well as practically the owner. According to Roman law this moment is determined by the rules of usucapio.

There is yet another element to be considered. An owner who is forced to assert his title as against a third party by an action at law, will be called on to prove his ownership. He himself may have acquired his property by traditio from the person previously in possession. That, however, is not sufficient to prove that he is owner. For traditio is a derivative mode of acquisition, and his predecessor, or auctor, could only make him owner, if he (the auctor) was owner himself. The plaintiff would accordingly be obliged to prove the title of his predecessor as well. But the title of the latter may also be merely derivative; he may also have acquired his property (say, a house) by sale and traditio. This would carry us back to the predecessor's predecessor, and so forth—a process which might be continued *ad infinitum*. It is therefore simply impossible to prove ownership by means of derivative modes of acquisition alone. Hence the necessity for supplementing the derivative title by an original one. This original title is usucapio. There is no need for me to trace back the titles of all my predecessors. It is enough if I can prove that I acquired the thing bona fide, that I possessed it for a certain period, and that consequently I should, in any case, have acquired it by usucapio, even supposing the traditio itself had not been sufficient to make me owner. The purpose of the rules concerning usucapio is to make derivative titles (such as traditio)

indefeasible after a certain time, and to render them independent of all previous titles.

Thus the necessity for a title by prescription—the necessity, in other words, for providing that, in certain circumstances, possession, even though in itself unauthorized, shall, after the lapse of a particular time, ripen into ownership—arises from the fact that, but for such a title, rights of ownership would neither be safe nor capable of proof.

Early Roman law had not failed to observe this fact, and accordingly it recognized a mode of acquiring ownership by means of a possession—a possession animo domini, or 'usus'—continued, in the case of immovables, over a period of two years and, in the case of all other things (ceterae res), over a period of one year. This usucapio of the Twelve Tables, however, being an institution of the jus civile, was confined to Roman citizens, and was moreover objectively applicable to such things only as admitted of quiritary ownership. Thus all provincial soil was excluded from the operation of the civil usucapio, for according to Roman law the fundus provincialis could never be the object of private ownership (dominium ex jure Quiritium), but could only be owned by the populus Romanus. In reality, however, land could, of course, be dealt with in the provinces by sales and purchases, by inheritances and legacies, in a manner and to an extent which virtually made houses, gardens, farms, &c., the objects of private ownership. But the titles, such as they were, received no legal protection from the Roman jus civile. The provincial governors (praesides), however, introduced, by means of their edict, a form of legal protection called 'praescriptio longi temporis'. If a person, having come into possession of land on some lawful ground (justo titulo) and in good faith (bona fide), and having continued in the possession of such land for 'a long time', were sued by the person claiming to be owner of the land, he (the defendant) had a good defence to the action, and was protected by what was called a praescriptio, i.e. by a reservation made in his favour, differing in point of form from an exceptio by being placed at the head of the formula. A 'long time' was declared to mean ten years inter praesentes (i.e. if both parties were domiciled in the same province) and twenty years inter absentes (i.e. if they were domiciled in different provinces). Subsequently he was allowed to bring a real action (in rem actio) against any third party, when the same conditions were forthcoming.

Justinian fused the usucapio of the civil law and the longi temporis possessio of the magisterial law into a single system. Longi temporis possessio was adopted as the period of prescription for land, whether the land were fundus Italicus or fundus provincialis being now immaterial. In addition to this he retained the usucapio of movables, extending the term of prescription, however, from one year (as it was in the old law) to three years. In Justinian's law, therefore, ownership in land is acquired by usucapio in ten years inter praesentes, and in twenty years inter absentes; ownership in movables is acquired in three years. It is not necessary, for purposes of usucapio, that I should have been in actual possession myself during the whole period; for in calculating my term of possession I am allowed to reckon the possession of my predecessor from whom I acquired the property justo titulo. This is what is called accessio possessionis. In the case of a pledge, the pledgor is even entitled to the benefit of his pledgee's 'derivative' possession; that is to say, his usucapio of the thing pledged continues to run, notwithstanding the fact that his possession has ceased altogether (infra, p. 332, n. 2). In addition to the requirements as to length of possession, it is necessary that the possession should have originated in a lawful ground, a so-called justus titulus (such as traditio or legacy), and that there should be what is called bona fides, i.e. that there should be good faith on my part, that I should, in other words, be convinced of the legality of my possession.[1] Res

[1] The jurists had already required bona fides in the usucapio of the early law. But there was also a usucapio without bona fides, especially the so-called usucapio pro herede (infra, § 110) and the usureceptio ex fiducia. The latter occurred where a debtor, after mancipating a thing fiduciae causa (infra, pp. 352, 353) to his creditor, retained, or recovered, possession of it free of defect, i.e. without hire or precarium. The debtor could, in such a case, recover ownership in the thing by usucapio even without bona fides. If he had paid his debt, he could recover ownership in spite even of hire or precarium, because, in that case, the creditor's ownership was merely formal (v. p. 63, n. 15) and the debtor was, for all practical purposes, already the owner. Since the requirement of bona fides was based, not on express statute, but merely on the 'interpretatio', it was within the power of this same interpretatio to fix the limits of the principle it had established. The only requirement imposed on usucapio by the Twelve Tables themselves was that the thing should not have been stolen.—The usureceptio ex fiducia, like the usucapio pro herede, was completed in one year even in the case of land. The fiducia (i.e. the thing mancipated fiduciae causa) was, like a res hereditaria, counted among the 'ceterae res' for which the Twelve Tables fixed a usucapio of one year.—There are cases in which usucapio originates in what is called a titulus putativus, i.e. a merely supposititious title which is really no title at all. In such cases the usucapio is based, as a matter of

extra commercium (supra, p. 302) are of course incapable of usucapio, because they cannot be objects of ownership at all. There are other things—the so-called res inhabiles—which, though in commercio, were nevertheless withdrawn from usucapio by positive enactment. Thus the Twelve Tables and the lex Atinia exempted res furtivae, the lex Julia et Plautia res vi possessae. Connected with these exemptions is the rule of what is called extraordinary usucapio or prescription (longissimi temporis praescriptio) which was introduced by Justinian. According to this rule, if a thing is res inhabilis (i.e. is withdrawn from usucapio by positive enactment), or if the possessor either has no title at all, or (though he has a title) is perhaps no longer in a position to prove it—in such cases ownership can nevertheless be acquired by continuous possession extending over thirty or forty years, provided only that the possession was acquired bona fide. Assuming, then, that there is bona fides, it is sufficient for the purposes of this usucapio, if the conditions required for the limitation of an action (supra, p. 283) are satisfied. If a person, having acquired bona fide possession of a thing, remains in possession so long that an action claiming ownership in the thing is, as against him, barred by limitation, he not only has the benefit of the plea of limitation, but is positively entitled to be regarded as owner, and is consequently entitled, if he loses possession of the thing, to enforce his ownership by action against every other person. A thief or a wrongful ejector is therefore absolutely precluded from acquiring property himself even by longissimi temporis praescriptio, because he is 'in mala fide', but a third party who acquires the property in good faith from the one or the other is under no such disqualification.

In classical Roman law usucapio performed a twofold function. In the first place, it served the purpose of transforming bonitary into quiritary ownership, in other words, of perfecting a legal title in cases where a thing was acquired from its owner. For the right of a person in a res mancipi which had been informally conveyed to him only passed into quiritary ownership, when supplemented by a

fact, on bona fides alone. Usucapio of this kind occurs, when the facts are such as to justify the belief in the existence of a title. For example: On my birthday a cask of wine is sent to me under circumstances which make it reasonable to suppose that it came as a present from my friend X. In reality, it was only delivered at my house by mistake. In such a case usucapio would be possible.

usucapio extending over one or two years. In the second place, usucapio was used for the purpose of protecting the title of a person who had acquired a thing bona fide from one who was not the owner. For example: A's heir sells and delivers to B a thing which he has found among the property left by A and which he erroneously supposes to have belonged to A. The necessity for usucapio arose, in the first case, from a defect in the form of the transfer; in the second case, from a defect in the right of the auctor. In Justinian's law the antithesis between modes of acquisition which are free from formal elements (the modes of the jus gentium), and modes of acquisition which require formalities (the modes of the jus civile), has disappeared. Every mode of acquisition confers full ownership, provided always that, in the case of derivative titles, the auctor was really owner. Thus usucapio ceases to have any application where a thing is acquired from its owner, and only the second function of usucapio remains: the function, namely, of making a person, after a certain time, owner of a thing he had acquired from one who was not its owner.

pr. I. de usuc. (2, 6): Jure civili constitutum fuerat ut, qui bona fide ab eo qui dominus non erat, cum crediderit eum dominum esse, rem emerit, vel ex donatione aliave qua justa causa acceperit, is eam rem, si mobilis erat, anno ubique, si immobilis, biennio tantum in Italico solo usucapiat, ne rerum dominia in incerto essent. Et cum hoc placitum erat, putantibus antiquioribus dominis sufficere ad inquirendas res suas praefata tempora, nobis melior sententia resedit, ne domini maturius suis rebus defraudentur neque certo loco beneficium hoc concludatur. Et ideo constitutionem super hoc promulgavimus qua cautum est ut res quidem mobiles per triennium usucapiantur, immobiles vero per longi temporis possessionem, id est inter praesentes decennio, inter absentes viginti annis usucapiantur: et his modis non solum in Italia, sed in omni terra quae nostro imperio gubernatur dominium rerum, justa causa possessionis praecedente, adquiratur.

§ 1 eod.: Sed aliquando etiam si maxime quis bona fide rem possederit, non tamen illi usucapio ullo tempore procedit: veluti si quis liberum hominem vel rem sacram vel religiosam vel servum fugitivum possideat.

§ 2 eod.: Furtivae quoque res et quae vi possessae sunt, nec si praedicto longo tempore bona fide possessae fuerint, usucapi possunt: nam furtivarum rerum lex duodecim tabularum et lex Atinia inhibet usucapionem; vi possessarum lex Julia et Plautia.

III. Accession.

Accession is the name given to a thing which, having previously existed as an independent thing, has passed into an integral part of another thing, e.g. a plant which I plant in my land. A thing which becomes an accession ceases to have an independent existence. But we have seen that there can only be ownership in independent things, not in parts of things (supra, p. 302). As soon, therefore, as a thing becomes an accession, all former rights of ownership in it are destroyed, because its existence as an independent thing is destroyed. If I am the owner of the principal thing (i.e. the thing in which the other is merged), I also become, beyond doubt, the owner of the accession (e.g. the plant), even though it (the accession) belonged to somebody else before. For the accession, by becoming an indistinguishable ingredient of *my* thing, passes, by the necessary operation of law, under *my* right of ownership in the thing, without prejudice, however, to the right of the previous owner to recover compensation from me. It is in this sense that accession is a mode of acquiring ownership, and it is an original mode, because it is a matter of indifference who the owner was before the union took place.

The following are examples of accession: 'implantatio'; 'inaedificatio,' a term applied to the process by which a house, as a whole, becomes an accession of the land on which it stands; 'alluvio,' i.e. the accretion by which a public river, in an imperceptible manner, enlarges a plot of land; 'avulsio,' i.e. the accretion by which a public river enlarges a plot of land in a perceptible manner (viz. by carrying away a large portion of the land higher up the river and adding it to mine; as soon as this addition is firmly attached to my land, it is an accession, and as such becomes my property); 'alveus derelictus,' i.e. the derelict bed of a public river which has changed its channel (the bed, which thus becomes free, becomes the property of the riparian owners on each side as an accession, the middle of the bed forming the boundary); 'insula nata,' a term applied when part of the bed of a public river becomes free, the rule in such a case being the same as with an alveus derelictus.

§ 20 I. de rer. div. (2, 1): Praeterea quod per alluvionem agro tuo flumen adjecit, jure gentium tibi adquiritur. Est autem alluvio incrementum latens. Per alluvionem autem id videtur

adjici quod ita paulatim adjicitur, ut intellegere non possis quantum quoquo momento temporis adjiciatur. § 21: Quod si vis fluminis partem aliquam ex tuo praedio detraxerit et vicini praedio appulerit, palam est eam tuam permanere. Plane si longiore tempore fundo vicini haeserit, arboresque quas secum traxerit in eum fundum radices egerint, ex eo tempore videntur vicini fundo adquisitae esse.

§ 22 eod.: Insula quae in mari nata est (quod raro accidit) occupantis fit, nullius enim esse creditur; at in flumine nata (quod frequenter accidit) si quidem mediam partem fluminis teneat, communis est eorum qui ab utraque parte fluminis prope ripam praedia possident, pro modo latitudinis cujusque fundi quae latitudo prope ripam sit. Quod si alteri parti proximior sit, eorum est tantum qui ab ea parte prope ripam praedia possident.

IV. Specification.

'Specification' is the working up of a thing into a new product. The baker, the carpenter, the wine-presser, the manufacturer, &c., convert the raw material into a product of labour which invariably possesses a higher economic value than the raw material. The labour results in the creation of a new form. This economic power of production is held to confer on the person who supplies the labour a right to claim the product as his own. That is to say, the manufacturer (specificans) who creates the new product—whether by his own labour, or, if he is an employer of labour, by that of others—becomes owner of the thing he has manufactured, his title being independent of that of any previous owner, and for that reason original, provided that he was acting bona fide and that (in accordance with a positive enactment of Justinian) the thing can no longer be restored to its previous shape. These limitations do not apply, if the specificans was owner of part of the materials.

§ 25 I. de rer. div. (2, 1): Cum ex aliena materia species aliqua facta sit ab aliquo, quaeri solet, quis eorum naturali ratione dominus sit, utrum is qui fecerit an ille potius qui materiae dominus fuerit: ut ecce, si quis ex alienis uvis, aut olivis, aut spicis vinum, aut oleum, aut frumentum fecerit aut ex alieno auro vel argento vel aere vas aliquod fecerit. . . . Et post multas Sabinianorum et Proculianorum ambiguitates placuit media sententia existimantium, si ea species ad materiam reduci possit, eum videri dominum esse qui materiae dominus fuerit; si non possit reduci, eum potius intellegi dominum qui fecerit. Ut ecce vas conflatum potest ad rudem massam aeris vel argenti vel auri reduci, vinum autem aut oleum aut frumentum ad uvas et olivas et spicas reverti non potest. . . .

Quodsi partim ex sua materia, partim ex aliena speciem aliquam fecerit quisque, veluti ex suo vino et alieno melle mulsum, aut ex suis et alienis medicamentis emplastrum aut collyrium, aut ex sua et aliena lana vestimentum fecerit, dubitandum non est hoc casu eum esse dominum qui fecerit, cum non solum operam suam dedit, sed et partem ejusdem materiae praestavit.

V. Fructus.

Fructus are the particular products of a thing which constitute the yield, or produce, of that thing, e. g. the milk of a cow, the offspring of animals, the fruits of fields or gardens. The fruits are intended to be separated from the thing which produces them, and the economic value of the latter is not diminished by the separation. In certain cases a person other than the owner of the principal thing becomes owner of the fruits, for example, a lessee, a usufructuary, also a bonae fidei possessor. A person who possesses another man's property in good faith acquires ownership in the fruits, though he is only bonae fidei possessor of the property itself; and if subsequently the owner brings an action against him, he (the bonae fidei possessor) is not required to pay compensation for the fruits he has consumed in good faith, but is only bound to restore the principal thing, together with such fruits as were extant at the moment when the action was brought. But as soon as the action has commenced, he must know that, possibly, he is in possession of another man's property. From the moment of litis contestatio therefore, he is bound to apply the utmost care (omnis diligentia) in the cultivation of the fruits. If the plaintiff succeeds in proving his ownership, he can require the defendant to hand over all the fruits gathered by him during the action (fructus percepti) or to pay compensation (as the case may be), and can further claim damages for such fruits as the defendant could have gathered by the exercise of due care (fructus percipiendi).

NOTE.

The Different Unions of Things.

THE union of two or more things into one—as when I mix the contents of two bottles of wine—is one of those processes which, by the necessary operation of law, effect a change of ownership. The question arises, who shall be considered owner of the new thing? Different cases are determined by different rules of law. Some of these cases have already been

discussed. The purpose of this note is to bring out clearly the broad principle which governs them all.

The following rules supply an answer to the question concerning the legal effect of a union of things as such, quite apart from the intention of the owners.

The union of several things into one is either (1) a union in the narrower sense of the term, or (2) an accession, or (3) a specification.

A union, in the narrower sense, occurs when the new thing is the same in kind as *both* the pre-existing things, e.g. when water is mixed with water, wine with wine, or when silver is fused with silver or gold with gold. Both the former things continue, in this sense, to exist in the new thing. The rule applicable to such cases is this: if the several things belonged to different owners, the effect of the union is to make the former owners joint owners of the new thing in the proportion in which their things contributed to the production of the new thing.

If, however, the new thing is identical in kind with only *one* of the pre-existing things, we have a case of accession. This happens, for example, when an arm is joined to a statue by ferruminatio (cp. Dernburg, *Pandekten*, § 209, note 6) in such a way as to make the whole thing one—the new thing is a statue, which the arm was not—or again, when a new leg is put on a table, or when a rose is planted in my land. In the latter case, as soon as the rose has struck root, only *one* thing exists, viz. the land; the rose has ceased to exist as an independent thing. In all these instances one of the things maintains its identity in spite of the union. It determines the character of the new thing. It has, so to speak, absorbed, or consumed, the other. Hence it is called the principal thing in contradistinction to the accessory, i.e. the thing (in the above cases the arm, the rose) which continues to exist only as a modification or enlargement of the other by which it is absorbed. The rule of law here is that the owner of the principal thing, by which the accessory has been absorbed, becomes the owner of the accessory. The former owner of the accessory is limited to a claim for compensation. The owner of the principal thing thus becomes the sole owner of the new thing.

Specification, lastly, may very well occur without any union at all (as when a dress is made out of a piece of cloth), but it may frequently be the result of a union of several things, as in the case of a picture. A union amounts to a specification, if the new thing is different in kind from each of the former things; in other words if, economically speaking, *none* of the former things continue to exist in the new thing. In such cases the rule already set forth applies: the ownership in the materials is destroyed and the owners of the former things are, all of them, limited to a claim for compensation. The new thing becomes the property of the specificans, provided always that the conditions for acquiring ownership as stated above (under IV) are satisfied.

If we keep the principle here laid down steadily in view, we shall find no difficulty in distinguishing between cases of specification and accession. If I paint a picture, using, for the purpose, in all good faith, another man's colours and canvas, whose is the picture? That will depend on circum-

stances. If the result of the painting is merely painted canvas, we have an instance of accession, because one of the things outlasts the union. This would happen, e. g., in the case of a painted drop-curtain or of a so-called painting which is really nothing more than a daub. The owner of the canvas (tabula) therefore becomes the owner of the paint. But if the result of the painting is a picture, we have a case of specification, because the product is a third thing which is neither paint nor canvas, the material being merged in the work of art. Fresco painting is necessarily a case of accession and not of specification, because the building continues as before and the immovable property outlasts the union. The same distinction may be applied to writing. If the result of the writing is merely paper that is written on, we have a case of accession; if it is a piece of writing (e. g. a deed), we have a case of specification.

Even the Roman jurists show some uncertainty in deciding the several cases (e. g. in regard to pictura and scriptura, cp. l. 23 § 3 D. 6, 1, where the question is argued entirely as a case of accession). Nevertheless the fundamental idea is clear. The question will always be whether both the former things, or one of them, or neither of them, can be regarded as, economically speaking, continuing to exist. The ownership of the thing follows the changes in its economic condition.

§ 65. *The Protection of Ownership.*

There are two actions by which an owner may protect his ownership: the rei vindicatio and the actio negatoria.

I. Rei Vindicatio.

Rei vindicatio is the action which an owner employs whenever a third person is in possession of his property: ubi rem meam invenio, ibi vindico. It is therefore the action by which an owner who is not in possession sues a non-owner who is in possession. If the defendant has some right in respect of the thing which entitles him to withhold it from the owner (e. g. a right of pledge, a usufruct, a right as hirer), he is protected by means of an exceptio. In the absence of any such right however, he must restore to the successful plaintiff (the owner) the thing itself with all its accessions (cum omni causa).[1]

II. Actio Negatoria.

The actio negatoria is the action by which an owner protects

[1] Hence the above-mentioned liability of the bonae fidei possessor to restore (or pay compensation for) the fruits as well as the principal thing (supra, p. 325). The liability of the malae fidei possessor is still more rigorous; for since he knows he is in possession of another man's property, he is responsible for fructus percipiendi during the whole period of his possession, including therefore the time prior to the litis contestatio. Cp. supra, p. 273, n. 5.

himself against a mere disturbance of his possession. It is therefore, as a rule, the action by which an owner who is in possession secures the integrity of his possession. The defendant is the person who has disturbed the possession of the owner. He is compelled to discontinue the disturbance and to pay the owner full compensation for damage.

§ 66. *The Protection of Usucapio Possession.*

If a person is in usucapio possession of a thing belonging to another, and continues in such possession till the usucapio is complete, he acquires, of course, together with the ownership of the thing, the remedies incident to ownership, viz. the rei vindicatio and the actio negatoria. In certain cases, however, the praetor deemed it desirable to protect a usucapiens even before his usucapio was complete. It was with a view to this purpose that he introduced the actio Publiciana in rem. The actio Publiciana in rem was an action for the protection of ownership which was granted by the praetor on a fiction that the plaintiff's period of usucapio was already complete—granted, in other words, to a possessor who needed nothing but the lapse of a certain time in order to become full owner (supra, p. 260). The practical result accordingly was that the usucapiens obtained a rei vindicatio (in the form, namely, of an actio Publiciana) even before he had acquired full ownership. In the same way he was allowed to avail himself of the actio negatoria. But inasmuch as the plaintiff, in such cases, was not yet the real owner, the actio Publiciana was weaker in two respects than the action of a genuine owner. For, in the first place, if at the time of the action the true owner was either in possession himself, or was disturbing the possession of the usucapiens, he could meet the actio Publiciana with an exceptio dominii and could not therefore be condemned. In the second place, if the defendant had usucapio possession of the same thing that the plaintiff formerly held in usucapio possession, but subsequently lost—in such a case the plaintiff could only succeed if both he and the defendant derived their title from the same auctor, and his (the plaintiff's) title was prior to that of the defendant. If, on the other hand, the defendant's title was derived from a different auctor, or if, though derived from the same auctor, it was prior to that of the

plaintiff, the defendant was likewise protected by an exceptio and was accordingly entitled to judgement.

In other respects, however, the result of the actio Publiciana was the same as that of a genuine action of ownership. Thus where possession was withheld, the actio Publiciana in rem took the place of a rei vindicatio; where possession was merely disturbed, it served the purposes of an actio negatoria. When we speak of the actio Publiciana, simply, we generally think of it as used for the former purpose, in lieu, namely, of a rei vindicatio; when used for purposes of an actio negatoria, it is known as the 'actio Publiciana negatoria'.

The object of the actio Publiciana was not to enable a usucapio possessor to deprive the owner of that which belonged to him—it was for this very reason that the owner had the exceptio dominii—but rather to protect a usucapio possessor against any person whose title was weaker than his own. The protection afforded by the actio Publiciana was only relative. But the actio could also be employed for yet another purpose. The owner himself might resort to it, if he had occasion to take legal proceedings on account of the withholding or disturbing of possession. And for this reason: he might urge that, quite apart from the question of his ownership, the requirements of usucapio possession were certainly satisfied in his case. Like a usucapio possessor he had purchased the thing, or acquired it on some other lawful ground. His possession was likewise accompanied by bona fides. That was quite sufficient to entitle him to the actio Publiciana, and to enable him to defeat an adversary who had no right in the thing. There was no need for him to proceed by a formal rei vindicatio and to prove that he had already acquired full ownership.

This last remark leads us to what was really the chief practical function of the actio Publiciana in the Common German Pandect law. In actual practice—in the great majority of cases, that is—the actio Publiciana was brought by *the owner*, not however in his capacity of owner, but in his capacity of usucapio possessor. The practical object of the legal rules concerning the protection of usucapio possession was to supply ownership with a second group of remedies available under easier conditions than those required in the formal and genuine actions of ownership. That such was the ultimate purpose of the actio Publiciana is clearly shown in Roman

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law itself. The action was open not only to a usucapio possessor who had acquired a thing a non domino, but also to a bonitary owner who had acquired a thing (a res mancipi, namely, by simple traditio) a domino—a bonitary owner being also a usucapio possessor in regard to quiritary ownership (cp. supra, p. 321 *ad fin.*). In classical Roman law therefore the actio Publiciana was employed, even formally, as an action of ownership, for the purpose, namely, of protecting bonitary ownership.

GAJ. Inst. IV § 36: Datur autem haec actio (Publiciana) ei qui ex justa causa traditam sibi rem nondum usucepit eamque amissa possessione petit. Nam quia non potest eam EX JURE QUIRITIUM SUAM ESSE intendere, fingitur rem usucepisse, et ita, quasi ex jure Quiritium dominus factus esset, intendit veluti hoc modo: JUDEX ESTO. SI QUEM HOMINEM A. AGERIUS EMIT, ET IS EI TRADITUS EST, ANNO POSSEDISSET, TUM SI EUM HOMINEM DE QUO AGITUR EX JURE QUIRITIUM EJUS ESSE OPORTERET, et reliqua.

L. 17 D. de Publ. act. (6, 2) (NERATIUS): Publiciana actio non ideo comparata est ut res domino auferatur (ejusque rei argumentum est primo aequitas, deinde exceptio SI EA RES POSSESSORIS NON SIT), sed ut is qui bona fide emit possessionemque ejus ex ea causa nactus est potius rem habeat.

§ 67. *The Protection of Juristic Possession. Possession and Ownership.*

From ownership we must distinguish possession. Ownership is the legal, possession, as such, merely the physical, control over a thing. To possess is to *exercise* ownership, and, generally speaking, the law intends the owner to be at the same time the possessor. Hence in ordinary language ownership and possession are often used as convertible terms. Nevertheless the conceptions of ownership and possession ought to be clearly distinguished. I may be owner without having possession and, conversely, I may have possession—as in the case of theft, for example—without being owner. The conception of possession is opposed to that of ownership in the same sense in which the conception of factum is opposed to that of jus.

Now it is obvious that there may be a great many different kinds of possession, or actual control over things.

In the first place, I may hold a thing in my hands, and may perhaps hold it in my own interests (e.g. a book which I have

borrowed), but may nevertheless acknowledge another person (in this case the lender of the book) to be the real dominus of the thing, so that, in taking care of it, or in otherwise dealing with it, it is my intention to preserve it, not only for myself, but primarily for the other person. In this instance I have merely the corpus, i.e. the external element, of possession. I am without the animus of possession, i.e. the will coinciding with the physical relationship. Though I hold the thing in my hands, I do not wish to hold it for myself alone, but, in the last resort, for some one else. The holder in this case lacks the animus rem *sibi* habendi. What he has is rather the animus rem *alteri* habendi. Such a relationship is described as mere 'detention'. A person who has detention (e.g. a borrower, hirer, lessee, depositary, mandatary) possesses the thing in subordination to another person. In possessing the thing, he acts, according to the Roman law of possession, as the representative (or, more accurately, as the assistant) of the other person. This other person (viz. the lender, lessor, &c.) possesses, according to Roman law, *through* the person who has detention.

In the second place, however, I may hold a thing in my hands and may intend, at the same time, to hold it for myself alone, either because, say, I am the owner, or at least believe myself to be the owner, or, perhaps, in spite of my knowledge that I am not the owner, it being my decided intention to keep the thing for myself alone, notwithstanding my knowledge of its ownership. An example of the latter alternative occurs in the case of a thief (whose actual relation to the thing he holds is indistinguishable from that of an owner), and also in the case of a pledgee, whose position is like that of a thief in so far as it is his intention, quâ pledgee, to shut out everybody, including the owner, from the possession of the thing.[1] In all such cases I have not merely

[1] According to Roman law the relation of a pledgee to the thing pledged is different from that of (say) a hirer or commodatarius to the thing hired or borrowed. The hirer does not intend to exclude his lessor from the thing; on the contrary, he intends, in dealing with the thing, to act as the intermediary of the lessor, so that, legally speaking, the latter possesses *through* him. For the right which the hirer claims to exercise is not a real right, but only an obligatory right—the right, namely, to require his lessor to allow him to use the thing (cp. p. 308). Whenever the hirer makes use of the thing, he may be said—in law—to be acting, in each case, on a permission granted him by the lessor; that is to say, he may be said, in each case, to be realizing the *lessor's* right to control the thing. The hirer only excludes strangers from the thing, but in so doing, he is acting—

the corpus, but also the animus of possession: the will coinciding with the physical relationship. I not only hold the thing in my hands, but intend to hold it for myself alone. This is the animus rem sibi habendi or, as it is called by modern writers, the animus domini. It is my intention to exclude every one else from the thing. So far as the exclusion of others is concerned, I hold the thing in just the same way as if I were the actual owner (i.e. as if I had legally sole control over it),[2] whether I am really the owner or not, and whether again, in the latter case, I know I am not the owner (as in the case of a thief or pledgee) or believe myself to be the owner (as in the case of a bonae fidei possessor or usucapio possessor).

This second kind of possession is technically known as 'juristic

legally speaking—in the service of, or as the instrument of, the possession of the lessor. To eject the hirer is, in the eye of the law, to eject the lessor. The hirer has *not* the will to possess (the animus domini), the pledgee has. The pledgee does not intend to *serve* the possession of the pledgor; on the contrary, he intends to exclude it.

[2] According to the prevalent theory, as first expounded by Savigny, 'animus domini' means the will to possess a thing as one's own. This theory fails to account for the juristic possession of a pledgee, who only intends to hold the thing pledged *as a pledge*. The possession of a pledgee is accordingly treated as an anomalous form of juristic possession and is described as 'derivative juristic possession'. This is not, in my opinion, the correct view of the case. It is true that the pledgee only intends to hold the thing as a pledge, but as far as the *possession* is concerned, his intention, so far from differing from that of an owner, is identical with it. The essence of possession as such is not the enjoyment of a thing, but merely the exclusion of others from the thing. Even a miser *possesses* his hoard. As far as the possession of a thing goes, any one who intends to exclude everybody else has the animus domini, the 'will of an owner', just as much as the owner himself. The distinction as to whether I hold a thing as my own or as a pledge is only material in reference to the will to enjoy the thing, not in reference to the will to possess it. The will to enjoy a thing is not sufficient in Roman law to constitute juristic possession, for a hirer and a lessee, though they have the will to enjoy, have not, according to Roman law, the animus domini, the will to possess (v. note 1). The position of a person holding precario (infra, note 5) and a 'sequester' (i.e. a person who takes charge of some object in dispute as stakeholder till the dispute is decided) is the same as that of a pledgee, and the prevalent doctrine accordingly classes their possession as 'derivative juristic possession'.—The same fundamental ideas on possession as are embodied in the text will be found set forth by W. Stintzing (quite independently of the present author) in his treatises, *Der Besitz* I, 1, 1 (1889), p. 121 (and see *ibid.* p. 8 ff., as to the position of a hirer, lessee, &c.), *Zur Besitzlehre* (1892), p. 5 ff., and in *Der Besitz* I, 1, B (1895), p. 8 ff. Stintzing, however, holds that even the objective element of possession consists, not in an actual control over the *thing*, but in an actual control over other persons, viz. in the actual—though not necessarily physical—exclusion of any interference on the part of other persons.

possession'. Two elements therefore go to make up juristic possession according to Roman law: (1) corpus (detention), the physical control of a thing, whether I have the corpus myself, or whether I have it through the medium of a person who has detention (a borrower, lessee, &c.); (2) the animus (scil. domini), or the intention to hold the thing for oneself alone, i. e. the intention to exclude every one else from the possession of the thing. If A hands over a thing to B for purposes of mere detention (as in a loan, a lease, a mandatum, &c.), in order, namely, that B may possess it not only for himself, but also for A, the direct holder of the corpus (the borrower, &c.) has only detention, whereas the indirect holder (the lender, lessor, mandans, &c.) has juristic possession.

According to the Roman law of possession, juristic possession alone is 'possessio' in the legal sense of the word. Juristic possession alone, according to Roman law—and it is to this fact that its name is due—gives rise to certain legal remedies which are granted for the purpose of protecting it. These remedies are the so-called possessory interdicts, of which, in Justinian's law, there are the following:

1. The Interdictum uti possidetis.

The interdictum uti possidetis is an interdictum 'retinendae possessionis', because it is designed to preserve, or 'retain', an existing juristic possession. It is employed in cases of a mere disturbance of possession, but only where the disturbance is of such a character as to interfere permanently with the possession. Thus it would be available if my neighbour were to erect buildings on his land interfering with my possession, but not if a person were merely to disturb me by tapping at my windows at night. In claiming an interdict, the juristic possessor claims, at the same time, a declaration recognizing his juristic possession, discontinuance of the disturbance, and damages for the disturbance which has already taken place. No one, however, is deemed a juristic possessor for purposes of this interdict, unless his juristic possession was acquired nec vi nec clam nec precario ab adversario.[3] A person

[3] Before Justinian the interdictum uti possidetis only applied to immovables, movables being dealt with by another interdictum retinendae possessionis: the interdictum utrubi. In the interdict uti possidetis (concerning immovables) the winner was the party who was in possession at the time of the granting of the interdict by the praetor, provided he had

who has acquired juristic possession from his adversary in the suit either vi (by force), or clam (clandestinely, anticipating the opposition of his adversary and secretly evading it), or precario (on terms of revocation at will, no binding transaction being concluded with the grantor), is not held to have juristic possession for purposes of the possessory suit, the juristic possession being deemed, on the contrary, to vest in the adversary from whom the thing was acquired vi, clam, or precario. To the latter therefore the possession of the thing must be delivered up. Thus if the plaintiff, being in possession, sues the person from whom he had acquired juristic possession vi, clam, or precario, by interdict uti possidetis for disturbance of possession, the result may be that he, the plaintiff, is condemned to deliver up possession to the defendant. It is in this sense that the interdict uti possidetis is described as an interdictum 'duplex'—the command of the praetor being addressed to both parties—and that the action ex interdicto uti possidetis (formal interdicts having ceased to exist in Justinian's time, p. 293) is reckoned among the judicia duplicia, or 'double-edged' actions, the peculiarity of which is that both parties sustain at the same time the rôle of plaintiff and defendant, so that not only the defendant, but also the plaintiff may be condemned.[4]

2. The Interdictum unde vi and Interdictum de precario.

The interdicta unde vi and de precario are both interdicta 'recuperandae possessionis'. They are employed for the purpose of recovering a juristic possession which has been lost. The interdict unde vi is used in cases of violent dispossession, in cases, that is, of

obtained his possession nec vi nec clam nec precario ab adversario. In the interdict utrubi (concerning movables) the winner was the party who had been in possession the greater portion of the year immediately preceding the granting of the interdict, provided he had obtained his possession nec vi nec clam nec precario ab adversario; and in calculating the time he was allowed to include the time during which his auctor had been in possession (accessio possessionis, cp. p. 320). But the practice of the Eastern Empire extended the principles of Uti possidetis to Utrubi (utriusque interdicti potestas exaequata est), and this extension was confirmed by the Corpus juris of Justinian (§ 4 I. 4, 15; l. 1 § 1 D. 43, 31). The interdict uti possidetis was thus, in substance, made applicable to movables as well, so that, in the case of movables and immovables alike, disputes concerning possession were decided entirely by reference to the question as to who was in possession at the time of the suit, i.e. at the moment of the litis contestatio (the granting of the interdict in the old way having fallen into disuse, p. 293). Cp. Fitting, *ZS. f. RG.*, vol. xi. p. 441.

[4] Partition suits (infra, p. 413) are the other judicia duplicia.

dispossession by physical force ('ejectment'). The interdict de precario is used where A seeks to recover from B the possession of a thing which he (A) had allowed B to use, without however intending thereby to create any legal rights or liabilities as between himself and B, in other words, without concluding any juristic act with B.[5] The interdict unde vi is directed against the ejector as such, and takes no account of the question whether he (the ejector) is still in possession or not, whether he carried out the ejectment himself or through others, or lastly whether the plaintiff himself had acquired the thing from the ejector vi, clam, precario, or otherwise. Thus, whereas in the interdictum uti possidetis the

[5] This fact—viz. the absence of any agreement between the parties—constitutes the difference between precarium, on the one hand, and the contracts of locatio conductio and commodatum, on the other. Even if, in a precarium, certain terms are agreed on between the parties, such terms are not intended to have any legally binding force. Precarium always means permissive possession till further notice, and nothing more—a possession, therefore, which is revocable at any moment; whereas, in a locatio conductio or commodatum, the right to use the thing can only be revoked after the expiration of the period agreed upon. The precario dans does not intend to be legally bound in any way. That is why he is at liberty to revoke at will and is never liable to pay damages to the precario habens (except indeed in cases of dolus), or to compensate the latter for expenses incurred, not even for impensae necessariae, in respect of which the precario habens had at most a jus tollendi. The same principle applies conversely to the precario habens: he is not bound to show diligentia, and if he has agreed to pay a rent (which was frequently the case in the classical times, though it would seem that, originally, precarium was a gratuitous permission to use a thing), such rent was nevertheless irrecoverable by action. Precarium signifies a relation which is purely one of fact, without any mutual concession of rights, and even the right of the precario dans to have the thing which he gave precario restored to him, is based, not on any promise, not (as in locatio conductio and commodatum) on an obligation, but solely on the fact that the other party *precario habet*. The possession of the precario habens is therefore formally independent. Between him and his grantor there exists no legal relation such as would make his possession subordinate to the precario dans in the sense in which the possession of the conductor is subordinate. The precario habens has accordingly juristic possession (cp. note 2). He possesses—formally speaking—on his own account, and as soon as the thing itself has been handed over to him—it is different where he only gets 'in possessione esse', a mere licence 'to be on the thing'—he excludes even the owner (the precario dans) from the thing. The precario dans has not possession of the thing granted precario. But the juristic possession of the precario habens has a 'flaw', a 'vitium possessionis': as soon as the owner revokes, the precarious possession, having been obtained with a flaw, must be restored to him, and he can sue for that purpose by a possessory action. The possessory relation is imperfect: it is 'vitiated' by the duty to restore.—The Roman precarium originated perhaps in the permissive possession of land which was granted by patrons to their clients for the purpose of enabling them to obtain a livelihood.

defendant can plead that the plaintiff acquired the thing from him vi, clam or precario (the so-called exceptio vitiosae possessionis)—the result being, as just explained, that the plaintiff may be condemned himself—in the case of the interdict unde vi such an exceptio vitiosae possessionis is inadmissible.[6] In the same way the interdictum de precario is directed against the precario habens as such, i.e. against the person who precario habet from the plaintiff or 'dolo malo fecit, ut desineret habere'. The interdictum unde vi, however, applies only to immovables, the interdictum de precario also to movables. Both the interdictum unde vi and the interdictum uti possidetis are barred intra annum (utilem); post annum there is only an action for the recovery of the amount by which the defendant has been enriched. The interdictum de precario, on the other hand, is only barred within the ordinary period of limitation, i.e. thirty or forty years, as the case may be.

The above-mentioned possessory interdicts (retinendae and recuperandae possessionis) can be claimed by the juristic possessor as such, quite apart from the question, whether he really has any right in the thing or not. His *possession* entitles him to a legal remedy—and it is for this reason that interdicts are called possessory remedies—quite irrespectively of his right. Nay, the question of right is positively excluded. It is no defence for the defendant to appeal to his right in the thing.

Nevertheless, in their practical result, these possessory remedies, while formally only protecting possession, uniformly serve the purpose of protecting ownership. In the great majority of cases it is the owner who, together with his ownership, has, or has had, the juristic possession. The owner, consequently, has, as a rule, the choice of the following remedies:

(1) He may proceed by 'petitory' action (i.e. on the ground of his right in the thing itself) and prove his title as owner (§ 65).

(2) He may proceed by 'petitory' action—viz. by actio Publiciana—and content himself with proving his title as usucapio possessor; that is to say, leaving his title as owner out of the question, he may

[6] This was the law as laid down by Justinian. In the classical law a distinction was made between the interdictum de vi armata (where the exceptio was inadmissible) and the interdictum de vi (quotidiana) where it was admissible. Justinian abolished this distinction, and forbade the use of the exceptio in all cases of the interdictum unde vi.

contend that, in his case, the requirements of usucapio possession are fulfilled (§ 66).

(3) He may proceed by a possessory remedy and confine himself to proving his juristic possession; that is to say, leaving his title, not merely as owner, but also as usucapio possessor out of the question, he may simply contend that, in his case, the requirements of juristic possession (viz. actual control over the thing accompanied by the animus domini) are fulfilled and take effect.[7]

Nothing proves more strikingly the vast economic importance of ownership than the abundance of legal remedies that were developed for its protection.

L. 12 § 1 D. de adq. poss. (41, 2) (ULPIAN.): Nihil commune habet proprietas cum possessione.

L. 1 § 2 D. uti possid. (43, 17) (ULPIAN.): Separata esse debet possessio a proprietate; fieri etenim potest ut alter possessor sit, dominus non sit, alter dominus quidem sit, possessor vero non sit; fieri potest ut et possessor idem et dominus sit.

L. 3 § 1 D. de adq. poss. (41, 2) (PAULUS): Et apiscimur possessionem corpore et animo, neque per se animo aut per se corpore.

II. JURA IN RE ALIENA.

§ 68. *Jura in re aliena in general.*

The exigencies of human intercourse cannot be permanently satisfied by ownership alone. It must be possible for a person to deal in a manner authorized by law with things which belong to others.

The need we thus experience in the conduct of our affairs for supplementing our own property by the property of others, without being compelled to acquire ownership in the latter, may be satisfied, to some extent, by the aid of obligatory transactions concluded with the owner, such as agreements to let or to lease. But since the rights acquired by transactions of that kind are merely obligatory rights (cp. § 73), they are only available against the particular person who is the other party to the agreement. If, for example, a lessee is disturbed in the possession and enjoyment of his land by a person other than the lessor, his rights as lessee do not, in Roman

[7] Cp. Jhering, *Jahrbücher f. Dogmatik des heutigen röm. Rechts*, vol. ix. p. 44 ff.

law, entitle him to sue the disturber; he must address himself first to the lessor, so that the latter may intervene to prevent the disturbance and, if necessary, take legal proceedings.[1]

Thus the rights we acquire in respect of the property of others by means of obligatory transactions are but incomplete, because their effect is merely personal. The need we are here discussing is therefore not adequately met by transactions of this description. There must be rights in respect of the property of others which enjoy a more effectual protection.

It was for the purpose of satisfying the need in question that the *real* rights in re aliena were developed. The rights they confer in respect of the thing are stronger, because they are absolute, i.e. they are rights which operate and are enforceable as against any third party (cp. p. 307). It is with these real rights in re aliena, which the Romans call 'jura in re' simply, that we have to deal in the following sections. The common characteristic, legally speaking, of all these rights, and that which distinguishes them from ownership, is this, that the rights of control which they confer are limited in regard to their contents, although, like ownership, they are directly operative as against any third party who interferes with them. In other respects the several jura in re differ essentially from one another in regard to the nature and extent of the control which they confer.

The jura in re developed in Roman law are comparatively few, viz. (1) Servitudes; (2) Emphyteusis; (3) Superficies; (4) Pledge.

§ 69. *Servitudes.*

The object of a servitude is to enable a person other than the owner of a thing to share in the benefits derivable from the use of that thing, while preserving the interests of the owner as fully as possible. The ownership is said to 'serve' (servit), i.e. it is curtailed, it is not absolutely free, though, at the same time, its effect (economically speaking) is not done away with. On the contrary, as against the servitude, ownership is the stronger right. The old civil law of the Romans very characteristically, therefore, refused to

[1] The lessee, in Roman law, could only claim that the *lessor* should allow him to use the land (supra, pp. 308 and 331, n. 1).

tolerate and admit any jura in re side by side with ownership except servitudes. It insisted that, on principle, ownership should be free, and it consequently declined to acknowledge jura in re otherwise than in the restricted form of servitudes. All the other jura in re were developed at a later period, the right of pledge (§ 72) and superficies (§ 71) by the praetor, emphyteusis (§ 70) by the legislation of the later Empire.

The restrictions imposed upon servitudes in the interests of ownership are twofold. In the first place, servitudes only confer on the person entitled certain specific and clearly defined rights of user; they do not confer a right of possession, in the technical sense (a right, that is, to exclude every one else from the thing), but only a real right of enjoyment, that is, a right to perform particular acts of user in regard to the thing. In the second place, servitudes are inalienable and non-transmissible, being annexed to a definite subject whose destruction entails the destruction of the right. Servitudes may accordingly be defined as real rights of user (i. e. of enjoyment) in respect of a res aliena, limited in their nature and annexed to a definite subject.

The subject of a servitude is determined in one of two different ways. In the case of a 'personal' servitude, the subject is a definite person; in the case of a 'real' or 'praedial' servitude, the subject is determined by reference to a thing, the owner for the time being of the land (praedium) being the person entitled to the servitude.

Personal servitudes are extinguished by the death of the person entitled, so that, at most, they are rights enjoyed for a life-time. And in Roman law capitis deminutio—in the classical period even capitis deminutio minima (supra, p. 181)—has the same effect as death. On the other hand, praedial servitudes are not (in the absence of other reasons) extinguished till the land itself is destroyed. Personal servitudes which, in respect of the rights they confer, are uniformly wider in scope than praedial servitudes, are all the more restricted in point of duration; praedial servitudes, on the other hand, which may last for ever, are all the more decidedly restricted in respect of their contents.

I. Personal Servitudes.

The most important personal servitudes are: ususfructus, usus, habitatio, operae servorum.

(*a*) Usufructus.

A usufruct confers a real right—for life, at most—to enjoy to the full, and to take the fruits of, a thing not one's own, but 'salva rei substantia'. A usufructuary is not allowed to alter the substance of the thing: in the case of land, for example, he is not allowed to change the mode of cultivation. If the thing undergoes an essential transformation—if, for example, a usufructuary converts a vineyard into a mine—the effect is rather to extinguish the usufruct. The usufructuary is only entitled to enjoy the thing in the particular form in which he receives it; he is not entitled to enjoy it in any form he likes.

The usufructuary may either have the use and fruits as they are, or, if he choose, he may take them in the shape of a sum of money, viz. by selling or letting the *exercise* of the usufruct to a third party. After the termination of the usufruct, the thing must be restored. Hence res consumtibiles (p. 304) do not admit of a usufruct. Where a person is given what is called a 'quasi usus-fructus' in consumable things (as where he is bequeathed the usufruct of 1,000 bottles of wine or of a certain amountof capital), the right he acquires in the consumable things is really ownership, but ownership qualified by a duty—which, of course, falls on his heir—to restore, after death, the same quantity and quality of consumable things (or their value in money) as he himself had received. Practically, therefore, the result is the same as with a verus ususfructus, but the legal form which the transaction assumes is not that of a usufruct, but of ownership encumbered with an obligation. Every usufructuary with a verus ususfructus must give security that, after the termination of the usufruct, he will return the thing and compensate the owner for any damage done to it through his (the usufructuary's) fault (cautio usufructuaria). And in the same way, a quasi-usufructuary is required to give security that he will restore the same quantity and quality as he received. The fact that the quasi-usufructuary is thus bound to give a cautio usufructuaria reduces his ownership in the res consumtibiles, in some degree, to the level of the rights of a mere usufructuary.

(*b*) Usus.

A usus confers on the usuary a real right—for life, at most—to enjoy, and take the fruits of, a thing not his own, but only so far

as the enjoyment and fruits are necessary for the satisfaction of his personal requirements. A usuary is therefore debarred, on principle, from letting or selling. Like the usufructuary he must give security (cautio usuaria) that he will restore the thing after the termination of the usus, and that he will exercise care in using the thing, or pay compensation for damage.

(*c*) Habitatio.

Habitatio is a real right—for life, at most—to live in a house not one's own, but to live there after the manner of a person entitled to maintenance. That is to say, whereas not only a usufructuary, but also a usuary of a house, has the right to determine for himself in what manner, and in what part of the house, he will live, in the case of habitatio it is the owner of the house who determines in what manner, and in what part of the house, the habitator shall live. The habitator, however, is entitled to let to others the rooms assigned to him for habitation instead of occupying them himself. The object of the habitatio being to enable the habitator to support himself, he (the habitator) is entitled to enjoy the benefit intended to be conferred on him in the shape of a sum of money.

(*d*) Operae Servorum.

By the term 'operae servorum' is meant a limited right to the use of another person's slave. It is a real right—for life, at most—to make use of the working powers of another man's slave, either by accepting his services oneself, or by letting them to others. Neither habitatio nor operae servorum (the latter of which seem, like habitatio, to have been granted for purposes of maintenance) are extinguished—even in the classical law—by capitis deminutio minima.

pr. I. de usufr. (2, 4): Ususfructus est jus alienis rebus utendi fruendi salva rerum substantia.

§ 1 I. de usu et hab. (2, 5): Minus autem scilicet juris in usu est quam in usufructu. Namque is qui fundi nudum usum habet, nihil ulterius habere intellegitur quam ut oleribus, pomis, floribus, feno, stramentis, lignis ad usum cottidianum utatur; in eoque fundo hactenus ei morari licet, ut neque domino fundi molestus sit, neque his per quos opera rustica fiunt impedimento sit: nec ulli alii jus quod habet aut vendere aut locare aut gratis concedere potest, cum is qui usumfructum habet potest haec omnia facere.

L. 1 pr. D. usufructuarius quemadmodum caveat (7, 9) (Ulpian.): Si cujus rei ususfructus legatus sit, aequissimum praetori visum est

de utroque legatarium cavere: et usurum se boni viri arbitratu, et, cum ususfructus ad eum pertinere desinet, restituturum quod inde exstabit.

II. Praedial Servitudes.

Praedial servitudes are either servitutes praediorum rusticorum, i. e. servitudes which usually occur in favour of a plot of agricultural land (rural servitudes) or servitutes praediorum urbanorum, i. e. servitudes which usually occur in favour of buildings (urban servitudes).

(*a*) Rural Servitudes.

The most important rural servitudes are: the several rights of way (servitus itineris, actus, viae); the right of conducting water over another's land (servitus aquaeductus); the right of drawing water on another's land (servitus aquae hauriendae).

(*b*) Urban Servitudes.

The most important urban servitudes are: the servitus altius non tollendi, i. e. the right to prevent buildings being raised above a certain height on the adjoining land; the servitus tigni immittendi, i. e. the right of placing the beam, on which my story rests, in my neighbour's wall; the servitus oneris ferendi, i. e. the right to use my neighbour's wall to support my own; the servitus stillicidii, i. e. the right to let my rain-water drop on my neighbour's premises.

In all these cases one piece of land 'serves' another. Hence the land on which the servitude is imposed is called the 'praedium serviens', and the land which has the benefit of the servitude, the 'praedium dominans'. The two praedia must be 'vicina', i. e. they must be so situated that one can be of use to the other. It is further required that the advantage which the praedium dominans derives from the praedium serviens shall arise from the permanent character of the latter (causa perpetua), and, conversely, that the benefits of the servitude shall exist, not only for this or that owner, but for every owner of the praedium dominans. It is in this sense that the one piece of land is said to serve the other *land*. There can be no praedial servitude, where the object is merely to satisfy the wants of the *present* owner.

III. A servitude enables the person entitled to it to do any act that may be necessary for the purpose of giving effect to the servitude. In the case of a praedial servitude—e.g. in the case of

a right of pasture—the limits of the right are determined by the requirements of the land to which it is annexed. On the other hand, the duty of the owner of the res serviens is, on principle, confined to suffering the other party's act of user (pati, non facere); he is never bound to do any positive act in favour of the person entitled to the servitude: servitus in faciendo consistere nequit. That is to say, a servitude, being a real right, cannot consist in the doing of something by *another*—in faciendo—it can only consist in a power enabling the person entitled to act *himself*. As with all real rights, so with servitudes, the other party may incur a liability *in consequence* of the servitude, if, namely, he acts in contravention of the real right; but a personal liability of that kind can never *constitute* the real right itself.

pr. I. de serv. praed. (2, 3): Rusticorum praediorum jura sunt haec: iter, actus, via, aquaeductus. Iter est jus eundi, ambulandi hominis, non etiam jumentum agendi vel vehiculum. Actus est jus agendi vel jumentum vel vehiculum. Itaque, qui iter habet, actum non habet; qui actum habet, et iter habet, eoque uti potest etiam sine jumento. Via est jus eundi et agendi et ambulandi; nam et iter et actum in se via continet. Aquaeductus est jus aquae ducendae per fundum alienum.

§ 1 eod.: Praediorum urbanorum sunt servitutes quae aedificiis inhaerent, ideo urbanorum praediorum dictae, quoniam aedificia omnia urbana praedia appellantur, etsi in villa aedificata sunt. Item praediorum urbanorum servitutes sunt hae: ut vicinus onera vicini sustineat: ut in parietem ejus liceat vicino tignum immittere: ut stillicidium vel flumen recipiat quis in aedes suas vel in aream, vel non recipiat: et ne altius tollat quis aedes suas, ne luminibus vicini officiatur.

IV. Acquisition of Servitudes.

According to the Roman civil law there is only one way in which a genuine servitude (ex jure Quiritium) can be validly created by agreement, viz. in jure cessio; in other words, by a fictitious vindicatio of the servitude followed by a confession on the part of the fictitious defendant and an addictio of the praetor in favour of the fictitious plaintiff. Rural servitudes in Italy, however, were regarded as res mancipi, and could therefore be created, not only by means of in jure cessio, but also by means of the juristic act which was used for the acquisition of *things*, viz. mancipatio (supra, pp. 48, 307).[1]

[1] A servitude might also originate in a so-called deductio servitutis, that is, in a reservation made by an owner on conveying his property by means

According to the praetorian law no such formal juristic act was required. It was sufficient, if the servitude were actually granted by one party and exercised by the other (quasi traditio servitutis).

The forms of the civil law were not available for the creation of servitudes in respect of provincial soil. Provincial soil admitted neither of genuine private ownership (supra, pp. 307, 319) nor of jura in re in the civil law sense of the word. In the provinces a servitude was created pactionibus et stipulationibus; that is to say, the parties entered into a pactio, or informal agreement, which, of its own force, constituted the servitude—it was therefore a real agreement*—and then proceeded to place the binding character of the right thus created beyond doubt by means of a stipulatio in which the grantor of the servitude promised that, if he interfered with the servitude, he would pay the grantee a specified penalty.[2]

of in jure cessio or mancipatio. Thus land could be mancipated, or (in the case of in jure cessio) vindicated (and accordingly 'addicted') 'deducto usufructu'. Where this was done, the servitude originated in the lex mancipationi, or in jure cessioni dicta (uti lingua nuncupassit, ita jus esto, p. 59), but it was based, formally, not on an agreement to create a servitude, but on the agreement to transfer ownership. It was not a case of two juristic acts being concluded, one for the transfer of ownership, the other for the creation of a servitude; there was but one juristic act, the act, namely, by which ownership was transferred *with a reservation*. Thus, the deductio servitutis was actually and formally a deductio, and not a constitutio servitutis. The person who became owner did not conclude first one transaction, by which he acquired a right, and then another transaction, by which he encumbered his right; he did not, in other words, first take a transfer of ownership, and then restrict his ownership by creating a servitude over the property. The transaction concluded by him was entirely *acquisitive*, though it is true that, since his ownership was encumbered, the effect of the right he acquired was curtailed. This is a matter of importance for those cases where the law allows a person to conclude transactions that benefit him, but prohibits him from concluding transactions that prejudice him (p. 216). Although a constitutio servitutis by a person of that class would be void, the effect of a transfer to him with deductio would be to create a servitude valid not only as against others, but also as against himself. It is a different matter where ownership is transferred by mere traditio. Traditio being an informal act, there can be no lex traditioni dicta according to the civil law (l. 6 D. comm. praed. 8, 4, is an interpolation). Consequently, just as there is no such thing as a fiducia by traditio (supra, p. 63, note 15), so there is no such thing as a deductio servitutis or pignoris in the case of a traditio. The reservation of a servitude or right of pledge in the case of a traditio would amount to a second agreement (operating to impose a burden) over and above the agreement of traditio. This is the explanation of the decision in l. 1 § 4, l. 2 D. de reb. eor. (27, 9).

* *Translator's Note*: see supra, p. 205.

[2] Cp. Karlowa, *Das Rechtsgeschäft*, p. 223 ff.; Lenel, in Jhering's *Jahrbücher f. Dogmatik*, vol. xix. p. 183 ff.; Hellwig, *Verträge auf Leistung an*

And this mode of creating servitudes, which had been developed on the provincial estates, was the only mode recognized in Justinian's law. In jure cessio and mancipatio of servitudes disappeared. We thus arrive substantially at what was formerly the rule of the 'common law' in Germany, the rule, namely, that a servitude can be created by simple agreement.

In addition to agreements, we have the following modes of acquiring servitudes:

(1) Legacy—the civil law requiring in this case that the form of legatum per vindicationem should be employed (cp. § 115, I 1);

(2) Adjudicatio in a partition suit; as, for example, where the judge, for purposes of the partition, awarded ownership to one party and a usufruct to the other, or awarded mutual praedial servitudes to the respective owners in cases where the land was actually divided. If the adjudicatio was to have quiritary effect, it was necessary, according to the civil law, that the partition suit should be carried through in the judicium legitimum (v. supra, p. 247);

(3) Usucapio. The old usucapio servitutis (within a period of one or two years) was, it is true, abolished by the lex Scribonia, but, in its place, the magisterial law extended the application of longi temporis possessio (supra, p. 319) to servitudes. Accordingly a servitude was acquired by being exercised for ten years inter praesentes, or for twenty years inter absentes, nec vi nec clam nec precario.

V. Extinction of Servitudes.

A servitude is extinguished:

(1) by the death or capitis deminutio of the person entitled, where the servitude is personal; by the destruction of the land, where the servitude is praedial (supra, p. 339);

(2) by confusio, where the person entitled to the servitude acquires the ownership of the thing, or where the owner acquires the servitude;

(3) by release to the owner of the servient thing;

(4) by bequest of the exemption from the servitude;

(5) by non usus, i. e. by non-exercise of the right per longum tempus (ten years inter praesentes, twenty years inter absentes). Servitutes praediorum urbanorum however are not extinguished,

Dritte (1899), p. 41, note 75; Rabel, *Die Haftung des Verkäufers* (1902) p. 60 ff.

unless, in addition to non usus on the part of the owner of the praedium dominans, there is also what is called usucapio libertatis, i.e. some positive alteration in the praedium serviens by which its freedom from the servitude is actually accomplished, as where a house is raised in spite of a servitus altius non tollendi. The personal servitudes of habitatio and operae servorum are not extinguished by non usus, nor, even in classical Roman law, by capitis deminutio minima. The law does not allow the purposes of maintenance, which habitatio and operae servorum are intended to serve, to be frustrated by a temporary non-exercise of the right or a mere change of family relationship.

L. 6 D. de S. P. U. (8, 2) (GAJUS): Haec autem jura (praediorum urbanorum) similiter ut rusticorum quoque praediorum certo tempore non utendo pereunt; nisi quod haec dissimilitudo est, quod non omnino pereunt non utendo, sed ita si vicinus simul libertatem usucapiat. Veluti si aedes tuae aedibus meis serviant ne altius tollantur, ne luminibus mearum aedium officiatur, et ego per statutum tempus fenestras meas praefixas habuero vel obstruxero, ita demum jus meum amitto, si tu per hoc tempus aedes tuas altius sublatas habueris; alioquin, si nihil novi feceris, retineo servitutem. Item, si tigni immissi aedes tuae servitutem debent, et ego exemero tignum, ita demum amitto jus meum, si tu foramen unde exemptum est tignum obturaveris et per constitutum tempus ita habueris. Alioquin, si nihil novi feceris, integrum permanet.

VI. Protection of Servitudes.

Servitudes are protected by means of the actio confessoria in rem. The plaintiff must allege and prove his right to the servitude. The disturber is condemned to pay damages, to recognize the servitude, and to discontinue further acts of disturbance. The actio confessoria is thus the counterpart of the owner's actio negatoria (p. 327). The actio negatoria is used by the owner in order to stop an unwarranted attempt to exercise a servitude, as he would use it to stop any other disturbance of his ownership. The actio confessoria is used by the person entitled to a servitude to assert his servitude as against the owner or any third party, and to obtain, at the same time, an actual recognition of his right. The actio confessoria is a juris vindicatio, the plaintiff claiming 'jus sibi esse utendi fruendi' (eundi, agendi, &c.). Just as the owner claims the thing for himself by rei vindicatio, so the person entitled to a servitude claims his

right for himself (his jus in re aliena, namely, his right to *enjoy* the thing, not the thing itself) by juris vindicatio.

Corresponding to the actio Publiciana which was granted in lieu of a rei vindicatio, there was an actio Publiciana confessoria in rem which, like the actio Publiciana, was granted in two cases:

(1) where a servitude was acquired a domino (from the owner of the praedium serviens), but not in a form which the civil law regarded as sufficient, not, that is, by in jure cessio or mancipatio, but only by pactio and quasi traditio. This case would correspond to the case of bonitary ownership discussed above (p. 311);

(2) where a servitude was acquired bona fide a non domino and the acquisition was supplemented by quasi traditio, i. e. by actual possession obtained through the exercise of the servitude. Here the plaintiff forbore from offering, or was unable to offer, any evidence to show that the grantor of the servitude was really the owner of the praedium serviens. This case would correspond to the case of usucapio possession, and the force of the actio Publiciana confessoria, like that of the actio Publiciana in rem as employed by the usucapio possessor, was merely relative, the action being only available against persons whose title was weaker than that of the plaintiff (p. 328), and being, more particularly, liable to be repelled by the true owner of the praedium serviens by means of an exceptio dominii.

Particular servitudes were also protected by possessory remedies, i.e. by interdicts, granted, without proof of legal title, on the ground of the juristic possession of the servitude alone (quasi possessio or juris possessio); that is to say, on the ground of an actual exercise of the servitude (corpus) coupled with an intention of acting as a person entitled to such servitude (animus). Possessory remedies of this kind were given to a usufructuary and a usuary, the possessory interdicts (pp. 333, 334) being applied in the form of interdicta utilia. Further, a person who was in actual enjoyment of a right of way was protected by the interdictum de itinere actuque privato, provided he exercised such right for thirty days in the preceding year nec vi nec clam nec precario ab adversario. A person who possessed a right to convey water over his neighbour's land was protected by the interdictum de aqua, provided he exercised such right at least once within the last year of user bona fide nec vi nec clam nec precario. A person who enjoyed a right to draw water on his

neighbour's land was protected by the interdictum de fonte under the same conditions as were required in the interdictum de aqua.

§ 70. *Emphyteusis.*

Emphyteusis is the perpetual lease of Roman law. The perpetual lease came into use, in the first instance, in the shape of the 'jus in agro vectigali' in connexion with the administration of public lands by the Roman State and municipalities. It became the practice of the State and the municipalities to let their land—more particularly their rural estates (praedia rustica)—in perpetuity, subject only to the payment of an annual rent (vectigal), the land thus let being known as 'ager vectigalis'.[1] This practice was adopted principally —but not exclusively—in regard to uncultivated land. At a comparatively early date the praetor granted the possessor of an ager vectigalis, a real action, viz. a 'utilis rei vindicatio'. This jus in agro vectigali survived, under the name of 'jus perpetuum', till the later Empire, and the perpetual leases of State demesnes continued, as a rule, to be granted in this form. Emphyteusis, on the other hand, was originally, not a lease in perpetuity, but a lease for a fixed term of years. The name occurs from the close of the third century onwards, and is used to describe leases of land belonging to the private estate of the reigning dynasty (patrimonium) which were granted subject to the payment of rent. After the expiration of the term of such leases the rent could be raised, or the emphyteuta could be deprived of the land. In the course of time, however, emphyteusis ceased, in point of fact, to be a lease for a fixed term, and developed into a perpetual lease. In actual practice the Crown did not resume possession when the term came to an end, and the emphyteuta thus acquired a permanent interest in the land and was not liable to have his rent increased. By the middle of the fourth century jus perpetuum and emphyteusis had become merged in one another, and the term 'emphyteusis' appears henceforth in the law of the Empire as the general name for a perpetual lease.[2] The

[1] The practice was not, however, confined to land; there were also 'aedes vectigales'; Degenkolb, *Platzrecht*, pp. 51, 84, *ad fin.*

[2] The above account of emphyteusis is based on Mitteis's essay, *Zur Geschichte der Erbpacht im Altertum*, in the *Abhandlungen der sächsischen Gesellschaft d. Wissenschaften* (phil.-histor. Klasse), vol. xx, 1901, as to which see the observations of Mommsen in the *ZS. d. Sav. St.*, vol. xxiii. p. 441 ff. An interesting parallel to the process described by Mitteis, by

doubts which existed among the Roman jurists as to whether emphyteusis was a sale, or merely a hire of the land, were settled by an enactment of the Emperor Zeno which declared that the agreement between the emphyteuta and the dominus was a special kind of juristic act, viz. a 'contractus emphyteuticarius', and that the legal relationship created by emphyteusis was sui generis, and was governed by rules of its own.

The rights of an emphyteuta are as follows:

Though not the owner of the land, he is nevertheless entitled to exercise all the rights of an owner, so that, practically, he stands to the land, as long as his right lasts, in the same relation as though he were actually the owner. He has the full right to take, not only the fruits, but all the produce of the land, and consequently also the right—which a usufructuary, or a mere lessee for a short term of years, has not—to make improvements and change the mode of cultivation. Like the owner he acquires the fruits by mere separation; he need not take actual possession of them (perceptio). He is protected by the same remedies as the owner, viz. the rei vindicatio (utilis), the actio negatoria (utilis), and—when the fundus emphyteuticarius is entitled to a praedial servitude—the actio confessoria (utilis). Moreover, if he is in the actual enjoyment of his right, he can, like the owner, claim to have his possession protected by means of the possessory interdicts (supra, pp. 333, 334). In point of actual strength, his possession is equal to that of the owner. He has the animus domini, i. e. he intends, without any qualification, to hold the thing in his own interest, to be, for all practical purposes, the owner himself.

On the other hand, the duties of an emphyteuta are as follows:

(1) He must pay his annual rent (vectigal, canon); (2) he must not deteriorate the property; (3) he must give his landlord notice of his intention to dispose of his rights as perpetual lessee so that the landlord may, if he choose, exercise his right of pre-emption (jus protimiseos). If the emphyteuta fail in any of these duties, e.g. if his rent be three years in arrear, the landlord (dominus emphyteuseos) has the right of eviction, i.e. he may deprive the emphyteuta of his rights as perpetual lessee.

which leases for a fixed term of years were transformed into perpetual leases, occurs in German law in the history of the free 'Erbleihe': cp. Rietschel, *ZS. d. Sav. St.* (Germanistische Abteilung), vol. xxii. p. 181 ff.

As compared with servitudes, there are three points which distinguish emphyteusis: (1) the emphyteuta stands, not only practically, but, in the main, also legally in the position of an owner; emphyteusis therefore confers a considerably wider range of rights than any of the servitudes: it is intended to take the place of ownership; (2) emphyteusis is heritable and alienable; (3) an emphyteuta who actually exercises his right has (according to the true view) juristic possession of the *land*; a person who exercises a servitude has only juristic possession of the *right*, i. e. quasi possessio (p. 347): what he possesses is not the land, but the servitude, e. g. the right of way. An emphyteuta excludes the owner from the land; the exercise of a servitude by another does not affect the owner's possession of the land.[3]

As distinguished from a lessee for a short term of years, who has merely an obligatory right against the lessor, the emphyteuta has a real right in his land available against everybody.

§ 3 I. de loc. et conduct. (3, 24): Adeo autem familiaritatem aliquam inter se habere videntur emptio et venditio, item locatio et conductio, ut in quibusdam causis quaeri soleat utrum emptio et venditio contrahatur, an locatio et conductio? Ut ecce de praediis quae perpetuo quibusdam fruenda traduntur, id est, ut quamdiu pensio sive reditus pro his domino praestetur, neque ipsi conductori neque heredi ejus cuive conductor heresve ejus id praedium vendiderit, aut donaverit, aut dotis nomine dederit, aliove quo modo alienaverit, auferre liceat. Sed talis contractus, quia inter veteres dubitabatur et a quibusdam locatio, a quibusdam venditio existimabatur, lex Zenoniana lata est quae emphyteuseos contractui propriam statuit naturam, neque ad locationem neque ad venditionem inclinantem, sed suis pactionibus fulciendam.

§ 71. *Superficies.*

Superficies stands to houses in the same relation as emphyteusis to agricultural land. Superficies, in Roman law, is a perpetual lease of building land, subject to the payment of an annual rent (solarium). On the land thus leased the superficiary erects a house. He builds it with his own materials. By the rules of accession,

[3] Emphyteusis creates a right to possess (rei vindicatio), a servitude only creates a right to enjoy (juris vindicatio). A person who intends to exercise the right of an emphyteuta has the animus possidendi, the 'will to possess', even as against the dominus; a person who intends to exercise a servitude has only the will to enjoy (cp. p. 332, n. 2).

therefore, the ownership of the house vests in the owner of the soil: superficies solo cedit. A superficiary, however, has a real right, for himself and his heirs, to live in the house and to exercise the rights of an owner therein for the specified term of years (say, ninety-nine years) or for ever, as the case may be. Hence the legal position of the superficiary is the same as that of the emphyteuta. Like the emphyteuta he has the same remedies as an owner (in the form of actiones utiles), and his possession is expressly protected by the interdictum de superficie. He is entitled to execute repairs and alterations in the house, provided he does not deteriorate the property. The house is under his control, and accordingly he has, together with the essential rights of an owner, the juristic possession of the house (corpus and animus) in the same way as though he were actually the owner.[1]

The remarks made at the end of the last section in reference to emphyteusis are equally applicable to the differences between superficies and servitudes, on the one hand, and between superficies and locatio conductio, on the other hand.

The legal recognition of superficies is based on the praetorian law.

L. 1 pr. D. de sup. (43, 18): Ait praetor: UTI EX LEGE LOCATIONIS SIVE CONDUCTIONIS SUPERFICIE, QUA DE AGITUR, NEC VI NEC CLAM NEC PRECARIO ALTER AB ALTERO FRUEMINI, QUOMINUS FRUAMINI, VIM FIERI VETO. SI QUA ALIA ACTIO DE SUPERFICIE POSTULABITUR, CAUSA COGNITA DABO.

§ 3 eod.: Quod ait praetor: SI ACTIO DE SUPERFICIE POSTULABITUR, CAUSA COGNITA DABO, sic intellegendum est ut, si ad tempus quis superficiem conduxerit, negetur ei in rem actio. Et sane causa cognita ei qui non ad modicum tempus conduxit superficiem in rem actio competet.

§ 72. *Pledge.*

A right of pledge is a real right which enables the person entitled to it to secure payment of a claim through the medium of a thing. A creditor, as such, has only an obligatory right: a right, namely, to obtain satisfaction of his claim through the act of the debtor. A right of pledge gives him, in addition to his obligatory right, a real

[1] Degenkolb, *Platzrecht u. Miete* (1867); A. Schmidt, *ZS. d. Sav. St.*, vol. xi. p. 121 ff.; Karlowa, *Röm. RG.*, vol. ii. p. 1260 ff.—The analogue of the Roman superficies in the German Civil Code is the right called 'Erbbaurecht', or heritable building lease.

right: a right, namely, to obtain satisfaction of his claim through his own act, through the act, that is, of selling the thing pledged. Practically speaking, the creditor's right of pledge and his personal claim against the debtor lead to the same result, but in point of legal form they are different, the one being a real right, the other an obligatory right.

I. History of Pledges.

In early Roman law a right of pledge, in the proper sense of the term, i. e. in the sense as we have just defined it, was unknown. It is true there were certain juristic acts the practical result of which was the creation of a pledge, in other words, the securing of a claim by means of a thing. But there was no juristic act whose formal object it was to create a right of pledge over a thing.

1. Fiducia.

A person who wished to obtain credit by giving the creditor security for his claim, might transfer the ownership of a thing to the creditor by means of mancipatio or in jure cessio—which did not necessarily involve a transfer of possession (p. 81)—subject to an understanding that as soon as the debt was paid, the ownership should be retransferred. A mancipatio or in jure cessio of this kind operated as a conveyance on trust; it was, in fact, the fiducia which we have already described (pp. 60–63). In such a transaction, however, neither party got what he was fairly entitled to. As for the creditor, his position was indeed safe enough in point of form. He was the owner of the thing, and was therefore, in strict law, entitled to deal with it as he liked: he might, for instance, sell it in satisfaction of his claim. But his hands were tied by the pactum fiduciae. His fiduciary position bound him as an honourable man not to make any use of his legal right to dispose of the thing, and to hold himself in readiness to reconvey the ownership in the event of the debtor paying his debt. Thus though the fiducia afforded the creditor security for his claim by withdrawing the ownership of the property from the debtor till payment, it did not give him satisfaction. A special pactum de vendendo was required in order to release the creditor from his fiduciary obligation to the extent of leaving him free to obtain satisfaction by selling the thing. On the other hand, the position of the debtor was worse still. Even though he duly

paid his debt, he could never be sure of recovering the property he had parted with as a security for his debt. The creditor might, meanwhile, have alienated it, given it away, sold it, or exchanged it. In such cases, it is true, the creditor could be compelled by actio fiduciae (in which condemnation entailed infamy, p. 62, n. 12) to compensate the debtor, but as against the third party to whom the property had passed, the debtor had no remedy, for the third party was full and lawful owner. Thus the debtor could only obtain compensation, but not the thing itself. What he wanted was a real right entitling him to claim his property back from any third party into whose possession it might come.[1] But the drawback of the fiducia, as regards the debtor, lay precisely in the fact that he had parted with the ownership which would have given him the real right he required. These various disadvantages led to the adoption of a second method of giving creditors security for their claims, viz. pignus.

2. Pignus.

Instead of making the creditor owner of the thing which was to serve as his security, the debtor might merely transfer *possession* by simple traditio—complete (juristic) possession, it is true, but still only possession. Such a relationship was called pignus. Here the debtor's position was satisfactory enough. He retained his ownership and, with it, a real right to recover his property from any one who obtained possession of it. As soon as he paid his debt, no one had a right to withhold the thing from him. The creditor, on the other hand, was placed all the more decidedly at a disadvantage by this arrangement. True, he had actual possession of the thing, and the praetor protected his possession by means of the possessory interdicts. But he had no real right in the thing, and could not, therefore, make use of the ordinary in rem actio against third parties. And, worst of all, he had primâ facie no right to dispose of the thing in any manner whatever. Even though his debtor were in default, he could not sell the thing and recoup himself out of the proceeds. And if the debtor preferred to leave the thing with the creditor rather than pay his debt, the pignus was of no use to the creditor at all.[2] The problem therefore

[1] The possibility of usureceptio (p. 320, n. 1), which presupposed possession on the part of the debtor, afforded but scant protection.

[2] Hence it was sometimes agreed—by a so-called lex commissoria—that,

was how to devise a transaction which should leave to the debtor his ownership and, with it, a real right to recover the thing from third parties, and yet should, at the same time, confer on the creditor *a right in the thing*, the right, namely, in case of necessity, to realize the value of the thing for the purpose of satisfying his claim, in a word, a right of pledge, in the true sense of the term. This problem was solved with the aid of the praetorian edict.

3. Hypotheca.

The debtor could enter into a simple agreement with the creditor (without either mancipatio or traditio) that certain things belonging to him (the debtor) should serve the creditor as a 'hypotheca', i.e. should serve as a means of satisfying the creditor's claim, if he (the debtor) failed to pay. Such a relation was called hypotheca. It was borrowed, both in name and in substance, from Greek law. Under the old Roman law an agreement of this kind was totally void. The praetor, however, made it valid—in the first instance, in cases where tenant-farmers had hypothecated their farming-stock (invecta et illata) to their landlords. In such cases the praetor enabled the creditor (the landlord) to obtain possession of the things pledged by granting him the so-called interdictum Salvianum, as well as an ordinary legal remedy called the actio Serviana. The same protection was afterwards extended (by means of an actio quasi Serviana or actio in rem hypothecaria) to any person to whom property had been hypothecated by another. Thus, according to the praetorian law, a hypotheca gave the creditor, in the first place, a real right of action enabling him, on non-payment of the debt, to obtain possession of the thing hypothecated; and, in the second place, it gave him a right of sale, i. e. a right to realize the value of the thing for the purpose of satisfying his claim. The creditor therefore had all the rights

in default of payment, the ownership in the pignus should (by way of penalty) pass to the creditor. A similar proviso then came to be used in cases of fiducia, where the effect of the lex commissoria was to make the fiduciary creditor absolute owner of the thing (free from any trust) as from the moment when the default occurred. The pactum de vendendo, on the other hand, which apparently first came into use in connexion with fiducia, was, in its turn, extended during the Empire to pignus. Cp. Pernice, *ZS. d. Sav. St.*, vol. v. p. 35. The lex commissoria bears the impress of the past; its purpose is entirely penal (for the effect of the foreclosure is not to release the debtor); the pactum de vendendo points to the future: its object is the satisfaction of the creditor, and it anticipates, to that extent, the idea which afterwards took shape in the hypotheca.

he required, and, conversely, the interests of the debtor were protected by the fact that he retained his ownership and, with it, a real right to recover his property from any third party into whose hands it might come.

A genuine right of pledge had thus been developed. The hypothecary agreement was now an agreement which had for its formal as well as its practical object the creation of a right to dispose of a thing not one's own, in a word, the creation of a right of pledge. Of course the hypotheca might be coupled with a traditio of the thing into the possession of the creditor, as in the case of pignus, but such a traditio was not necessary. What *was* essential for giving rise to a right of pledge was, not the transfer of possession as such, but merely the agreement to hypothecate: ut res hypothecae sit. It was under the influence of the requirements of Greek trade that the development of Roman law thus passed from the earlier forms of pledges—pledges effected through a transfer of ownership (by means of mancipatio) and a transfer of possession (by means of traditio)—to a new form of pledge more in keeping with the capitalistic character of the time, a pledge created by a simple agreement under which the pledgee obtained, on principle, a right of sale, and the thing pledged was simply regarded as representing so much money's worth.

L. 9 § 2 D. de pign. act. (13, 7) (Ulpian.): Proprie pignus dicimus, quod ad creditorem transit, hypothecam, cum non transit, nec possessio, ad creditorem.

L. 5 § 1 D. de pign. (20, 1) (Marcian.): Inter pignus autem et hypothecam tantum nominis sonus differt.

II. The Rules of Law concerning Pledges.

A right of pledge originates:

(1) in ordinary cases, either in an agreement (pignus conventionale), or in a testamentary disposition (pignus testamentarium);

(2) in extraordinary cases, either in a statute—like the hypotheca in favour of the claims of the fiscus over the entire estate of persons indebted to it, or the hypotheca in favour of the claims of persons letting houses over the invecta et illata, i.e. the things brought in by their tenants (pignus tacitum or legale)—or in the seizure of a debtor's property in the course of a judicial execution (pignus judiciale).

A case of pledge (pignus) of the old type, where the creditor

obtains actual control, or mere detention, of a thing by way of security for his claim, without any real right of action or, as a rule, any right of sale, occurs when the praetor, with a view to giving a creditor provisional security for his claims, grants him 'missio in possessionem' in respect of the property in which he (the creditor) is interested (pignus praetorium). For an example of a pignus of this kind see supra, p. 287.

A right of pledge entitles the pledgee (1) to possess the thing pledged; (2) to realize its value (by sale, as a rule) for the purpose of satisfying his claim. As regards the right to possess (which is protected either by a petitory action, viz. the actio in rem hypothecaria, or by possessory remedies, viz. the possessory interdicts), where the thing is actually delivered to the pledgee in pledge, it arises at once on the delivery; in cases of a mere hypotheca, however, the right to possess does not arise until it becomes necessary for the creditor to assert his other right, his right, namely, to realize the value of the thing pledged. As to this latter right (the right of sale), it never arises till the claim is due, and the debtor, in spite of notice, or judgement, remains in default. Having carried out the sale, the creditor pays himself out of the proceeds. If the amount realized is in excess of his claim, he must restore the surplus (hyperocha) to the debtor (infra, p. 378). The so-called lex commissoria, or foreclosure clause, by which it was agreed that in case of non-payment the pledgee should become ipso jure owner (v. note 2), was declared void by a law of the Emperor Constantine. In case of necessity, however, where a sale was impracticable, the court could, on the petition of the pledgee—the 'impetratio dominii'—adjudge him the ownership of the thing at a certain valuation with a view to satisfying his claim. The hyperocha in such a case would be the excess of the assessed value over the amount of the debt secured by the pledge. 'Antichresis' is the name given to an arrangement between the pledgor and the pledgee by which the latter obtains, not only possession together with a right of sale, but also the right to take all the fruits and profits yielded by the thing, such fruits and profits to be accepted by him in lieu of interest.

The owner of the pledge may transfer his ownership to a third party, but of course the right of pledge already created in favour of the creditor continues to hold good as against the new owner.

In the same way the owner may pledge the same thing to several persons in succession. Successive rights of pledge of this kind may also arise by virtue of a statute. No one of several successive pledgees is entitled to exercise his right of pledge till the prior pledgee has been satisfied. Priority is determined, on principle, by reference to the time when the rights were respectively created (prior tempore potior est jure)—a principle to which Roman law did not, however, adhere in cases of so-called privileged rights of pledge, such as existed, for instance, in favour of the claims of the fiscus for public dues.

A right of pledge is extinguished, as soon as the debt is settled, or as soon as the creditor obtains satisfaction by realizing the value of the pledge, in other words, by selling the pledge. But it is a rule that till the entire debt has been discharged, the whole pledge remains liable for the unpaid balance: pignoris causa est individua. If a prior pledgee exercises his right of sale, subsequent rights of pledge are thereby destroyed. The object to which these subsequent rights related having been done away with, the pledgees are entitled, in lieu of it, to claim the hyperocha, which the prior pledgee is accordingly bound to hand over.

L. 1 C. si antiquior creditor (8, 20) (ALEXANDER): Si vendidit is qui ante pignus accepit, persecutio tibi hypothecaria superesse non potest.

CHAPTER III

THE LAW OF OBLIGATIONS

I. The Conception and Contents of an Obligation.

§ 73. *The Conception of an Obligation (Obligatory Right).*

An obligatory right,* within the meaning of the Roman private law of the classical period, is a right to require another person to do some act which is reducible to a money value. It is invariably directed against a determinate person, viz. the 'debitor', or debtor. Ownership may be asserted against all the world, but an obligation can only be asserted against the debtor, e. g. the vendor, if it arises from a sale, or the lessor, if it arises from a contract of letting and hiring. Obligatory rights are rights which only operate relatively, viz. as against the person of the debtor. The main point to be observed is that an obligatory right *consists*, as such, in the fact that a definite other person (the debtor) is bound to do something. Where a real right of mine gives rise to a duty on the part of my opponent—as where my right as owner entitles me to require him to deliver up a thing—such duty can only be regarded as the *consequence* of my right, whereas in the case of an obligatory right the duty, or obligation, of the debtor *constitutes* the whole of my right. An obligatory right is simply and solely a right to require a definite other person (the debtor) to act in a particular way.

The right of the creditor manifests itself in the obligation of the debtor, but this obligation does not imply subordination. Therein lies the difference between obligations, on the one hand, and family rights and the rights of public officials, on the other. Family rights and public rights produce subordination, personal subjection, a power of one will to coerce another will. An obligation leaves the debtor free as against his creditor. The debtor is the equal of the creditor. The latter cannot force the debtor, by any private

* As to this term, see supra, p. 308, *Translator's Note.*

act of his own, to fulfil the obligation. Force can only be applied for that purpose by the State at the suit of the creditor.

Inasmuch as an obligation neither implies, nor is intended to imply, subordination, it is confined, according to Roman law, to acts which are reducible to a money value. Obligations are not designed to create any general right of control over all the acts of the debtor. A debtor can, in the last resort, rid himself of every obligation by sacrificing a corresponding portion of his property for the purpose of indemnifying his adversary. An obligation means a deduction, not from a man's liberty, but only from his property.

L. 3 pr. D. de O. et A.(44, 7) (PAULUS): Obligationum substantia non in eo consistit ut aliquod corpus nostrum aut servitutem nostram faciat, sed ut alium nobis adstringat ad dandum aliquid vel faciendum vel praestandum.

L. 9 § 2 D. de statu lib. (40, 7) (ULPIAN.): Ea enim in obligatione consistere quae pecunia lui praestarique possunt.

§ 74. *Plurality of Debtors and Creditors.*

Just as several persons may be co-owners in respect of the same thing (p. 305), so several persons may be co-debtors or co-creditors in respect of the same obligation. We have then a case of what is called 'correal obligation'. Where there are several co-debtors—plures rei promittendi—the correal obligation is said to be passive; where there are several co-creditors—plures rei stipulandi—the correal obligation is said to be active. And just as co-ownership means the common ownership of several persons in respect of the same undivided thing, so correal obligation means the common liability or right of several persons in respect of the same undivided act.

Suretyship (fidejussio, infra, pp. 384, 385) is an example of a correal obligation. The surety and the principal debtor are both liable—the former, however, only as accessory debtor—for the whole of the same debt. The normal case of a correal obligation is a joint agreement in which the joint liability or right of all is expressly provided for.[1] For example: A and B jointly hire a

[1] A joint agreement as such (e.g. the joint hire of a room or a joint loan) only operates in Roman law to make each of the joint parties liable, or entitled, pro parte. Such an agreement, therefore, gives rise to a series of

room, or jointly accept a loan or commodatum, and agree, at the same time, that they shall both be liable for the whole debt, liable, that is, for the whole rent, the whole loan, the restoration of the whole commodatum, as the case may be. The result is a passive correal obligation. Or again: A and B, being co-owners of a house, let their house jointly (or give a loan jointly, &c.), and agree, at the same time, that each of them shall be entitled to recover the whole of what is due under the obligation. The result is an active correal obligation.[2] In all these cases the intention is not to enable the creditor to recover the whole of the same debt several times over. The object of a passive correal obligation is merely to render the position of the creditor more secure by making several debtors liable to him for the same debt. The object of an active correal obligation is to make it easier for the creditor to recover his debt by legal proceedings, a single action by a single creditor being sufficient for the purpose. Each correal creditor (e. g. an argentarius socius; v. note 2) may sue for the whole amount of the debt, without having to show that his co-creditor has given him authority to do so. A correal obligation is a plurality of obligations, where

rights or liabilities having nothing in common with one another, each of them existing in respect of part of the obligation only. A joint agreement does not give rise to a correal obligation, unless it expressly provides that all the joint parties shall be liable for, or entitled to, the whole. The usual means of creating a correal obligation among the Romans was a joint stipulatio by two or more persons in respect of the same act, the act, namely, which was the object of the obligation. Cp. the passage cited infra, p. 364, pr. I. de duobus reis 3, 16. Hence correal debtors were called duo pluresve rei promittendi, and correal creditors duo pluresve rei stipulandi.

[2] The following are further instances of correal obligation. Argentarii socii (i. e. the ostensible partners in a banking business) are correal debtors or creditors in respect of contracts concluded by each individual socius. Co-owners of a slave, or of an animal that has done damage, are correally liable in respect of the noxal action, or the actio de pauperie (§ 86, 5). A correal obligation also arises where a testator charges a legacy in the alternative, e. g. heres meus aut Titio aut Maevio decem dato, or: Lucius heres meus aut Maevius heres meus Sejo decem dato. Cp. e. g. l. 8 § 1 D. de legat. I (30). The implication here is that the alternative legacy shall be treated as *joint*, that 'aut' therefore shall be taken = et, as is expressly stated in l. 9 pr. D. de duob. reis (45, 2) and in l. 4 C. de verb. sign. (6, 38). Correality does not mean an alternative right or liability, but a joint right or liability. This fact, if borne in mind, may serve perhaps to explain the two passages we have just quoted from the authorities, the correctness of which has often been strongly impugned.—The idea of a correal obligation seems to have originated within the domain of the jus sacrum. The earliest correi are the convoventes, conjurantes, conspondentes (v. Leist, *Gräco-italische RG.*, p. 231), persons who have jointly pledged themselves to the gods to fulfil the same vow.

there is, economically speaking, only one obligation. And the correal obligation of Roman law is *one*, not only economically, but also legally, in virtue namely of the fact that, legally speaking, the plurality of obligations constitutes one common obligation of the several parties concerned. As in joint ownership the same thing has several owners, so in the case of a joint obligatory right, or liability, the same obligation has several creditors or debtors. In joint ownership, however, the principle applied by the Romans was that of proportional shares, i.e. each person sharing the ownership could only assert such ownership to the extent of his proportional share; whereas in the case of several persons sharing an obligatory right or liability, the principle of correality was applied, i.e. each of the persons sharing the obligation was entitled or bound in respect of the whole; each of them, in other words, represented *by himself* the entire debt or the entire claim. In both cases the underlying idea was that of a community of right or liability. Hence the Romans described a correal obligation as 'una obligatio' (communis obligatio), and the parties to a correal obligation as persons who 'unius loco habentur' (ejusdem obligationis participes, ejusdem obligationis socii). A correal obligation means a plurality of obligations based on a community of obligation: a joint liability in respect of the whole of the same debt or a joint right in respect of the whole of the same claim.

From a correal obligation we have, according to Roman law, to distinguish a solidary obligation[3]. A solidary obligation means the *separate* liability of several persons in respect of one and the same object. The normal case of a solidary obligation is a joint delict, as when two or more persons, acting jointly, do damage to property or commit a theft.[4] So far as the obligation creates a

[3] It should, however, be mentioned that there is a strong tendency on the part of the more recent writers on Roman law to deny the existence of any distinction between correality and solidarity, and to maintain that Roman law only recognized one form of joint liability, viz. the form described above as correal liability. See, more particularly, Binder, *Die Korrealobligation* (1899). But it cannot be said that the question has yet been finally solved.

[4] And, generally speaking, where several persons are jointly answerable for a wrong done, the obligation is solidary. Thus where several guardians are charged with the same guardianship, or several officials with the administration of the same property, they are solidarily liable for all damage caused by the act or default of any one of them, because each participates in the wrong done by the other. The examples given are all

duty to pay damages, it is solidary. Each of the co-delinquents is liable to make good the whole of the same damage.[5] Each of them has caused the entire damage. The facts supply a complete basis for the liability of each in respect of the whole, a liability which is quite independent of any *intention* on the part of each delinquent to render himself jointly liable with his co-delinquents. Hence though the object is one, the obligations are independent and separate. A solidary obligation means a plurality of obligations in respect of one and the same object without any community of obligation.[6]

The difference between a correal and a solidary obligation receives its best practical illustration from the rules concerning the extinction of the respective relations. The extinction of a solidary obligation as against all the parties concerned can only be brought about by performance, or something equivalent to performance; in other words, by the material satisfaction of the creditor. The object of the obligation being one, the performance of this object by one solidary debtor will necessarily release the others. If A has been compensated by one person for the damage he has suffered, he cannot claim damages over again from the other persons, for the simple reason that there is no longer any damage for which to compensate him. A correal obligation, however, is extinguished as against all the parties concerned, not only by performance, but by any mode of extinction whatever (even though it be a purely formal

cases of passive solidary obligation. But there are also cases of active solidary obligation. Cp. Jhering, in his *Jahrbücher f. Dogmatik*, vol. xxiv. p. 129 ff.

[5] So far, however, as the obligation ex delicto creates a duty to pay a penalty (as in the case of furtum to pay duplum or quadruplum, § 85), the result is not a solidary obligation, but a number of independent obligations, the object of which, though equal in amount (e. g. duplum), is not identical. Hence each joint perpetrator of a theft has to pay his penalty in full (the object being to ensure the punishment of all), whereas the payment of damages by one of the parties liable releases the rest.

[6] In the text I have adopted the argument contained in Unger's able and ingenious essay on Passivè Correality and Solidarity in Jhering's *Jahrbücher für Dogmatik*, vol. xxii. (1884) p. 207 ff. His view is opposed by Hölder (*Zwei Abhandlungen aus dem römischen Rechte*, Festschrift für Scheurl, 1884, p. 81 ff.; and see Unger's reply in Jhering's *Jahrbücher*, vol. xxiii. p. 106 ff.), and also by Waldner, *Die correale Solidarität* (1885). According to Hölder a correal obligation means a plurality of obligations which are regarded, by a fiction, as being one and identical; that is to say, the several debtors, or creditors, are treated by the law as mutually identical in respect of this obligation.

one) that affects the *existence* of the common obligation, as, for example, by acceptilatio or litis contestatio. If a surety has been released from his liability by acceptilatio, i.e. by a formal contract of release (infra, pp. 435, 436), the principal debtor is thereby released from all further claims. If one of two correal creditors under a loan brings an action in respect of such loan, his litis contestatio (supra, pp. 285, 286) operates to consume not only his own, but also the other correal creditor's right of action, and if judgement is given against him, such judgement entitles the successful defendant to meet the other correus with an exceptio rei judicatae. It follows from the community of obligation that the correal principle (the principle of representation) is as applicable to the extinction of the obligation as it is to the rights and liabilities to which the obligation gives rise; in other words, every party to a correal obligation represents the whole obligation, every party to a solidary obligation only represents his own obligation.

In the course of the development of Roman law the principle of correality was broken in upon. Thus Hadrian gave several cosureties the exceptio divisionis, i. e. the right to be sued for a proportional share only (infra, p. 385). Justinian extended this right (the so-called 'beneficium divisionis') by his 99th Novel to persons who, though correally liable by agreement, were nevertheless, materially speaking, only interested in part of the object of the obligation, for example, to persons who had hired a room jointly or accepted a loan jointly. The effect of these changes was to substitute pro tanto the principle of proportional shares (as applied in the case of joint ownership) in place of the principle of correality. Accordingly by l. 28 C. de fidejussoribus (8, 40) Justinian abolished the consuming force of litis contestatio as regards passive correal obligation, i. e. he provided in effect that an action brought against one correal debtor should not henceforth operate to consume the right of action against the other. Nevertheless the rule that a judgement obtained in an action to which one correus was a party was legally operative in regard to the other correi (so that the exceptio rei judicatae could be pleaded for, or against, the other correi), as also the rule that, where the period of limitation for a right of action was interrupted as against one correus, the interruption took effect as against the other correi, remained unaltered in the case both of active and passive correality. As far, then, as

the law of Justinian is concerned, a correal obligation may still be defined as a number of obligations bound up into one, and a solidary obligation as a number of independent obligations existing concurrently. In every correal obligation the liability of one correus is exposed to the effects produced by the acts of the others. Thus if one correal creditor waives his claim against the debtor, or unsuccessfully sues the debtor, the other correal creditor loses his right. A correal debtor is moreover primâ facie responsible for culpa imputable to his co-debtor. On the other hand, a solidary obligation is not affected by the acts of others; the liability of one solidary debtor, for example, is not affected by an action brought against the other. It is only where the *object* of the obligation disappears (viz. by payment or some other kind of satisfaction) that the solidary obligation ceases, by virtue of its own contents, to exist. In the law of Justinian the rule continues to hold good that correal obligation—joint agreement—means *joint* liability, and solidary obligation—joint delict—*separate* liability in respect of one and the same act.[7]

In the German Civil Code the distinction between a correal and a solidary obligation is not to be found. The Code only recognizes one form of joint liability—a form corresponding, in essentials, to the solidary obligation of Roman law.

L. 3 § 1 D. de duob. reis (45, 2) (ULPIAN.): Ubi duo rei facti sunt, potest vel ab uno eorum solidum peti; hoc est enim duorum reorum, ut unusquisque eorum in solidum sit obligatus possitque ab alterutro peti; et partes autem a singulis peti posse nequaquam dubium est; quemadmodum et a reo et fidejussore petere possumus. Utique enim cum una sit obligatio, una et summa est; ut, sive unus solvat, omnes liberentur, sive solvatur uni, ab altero liberatio contingat.

pr. I. de duob. reis (3, 16): Et stipulandi et promittendi duo pluresve rei fieri possunt. Stipulandi ita, si post omnium interrogationem promissor respondeat SPONDEO, ut puta cum duobus separatim stipulantibus ita promissor respondeat: UTRIQUE VESTRUM DARE SPONDEO. Nam si prius Titio spoponderit, deinde alio interrogante spondeat, alia atque alia erit obligatio nec creduntur duo rei stipulandi esse. Duo pluresve rei promittendi ita fiunt: MAEVI, QUINQUE AUREOS DARE SPONDES? SEI, EOSDEM QUINQUE AUREOS DARE SPONDES? respondeant singuli separatim SPONDEO.

[7] On the above subject v. Jhering, *loc. cit.* (supra, n. 4), pp. 185, 186; Czyhlarz, *Lehrbuch der Institutionen d. röm. Rechts*, 7th and 8th edd. (1905) pp. 150-2.

§ 75. *The Contents of an Obligation.*

Obligations may be divided, according to the nature of the act to be performed by the debtor, into obligations to provide a thing, obligations to pay money, and obligations to perform some other act. Where the obligation is one to provide a thing, the thing to be provided may be determined either individually or generically. *

I. In the case of an obligation to provide an individually determined thing—a thing determined *in specie*—the liability of the debtor is limited to the particular thing thus determined. If this particular thing is destroyed by some event for which the debtor is not answerable, the debtor is discharged: species perit ei cui debetur. Where, on the other hand, the thing to be provided is determined generically—in other words, by reference to a class—the debtor performs his obligation by providing any one thing belonging to that class—e. g. a horse—or by providing a certain quantity of things of that class, e.g. 100 sacks of wheat. If the particular things which the debtor intended to make over to the creditor in performance of his obligation are destroyed, the debtor is not thereby discharged, because the contract did not bind him to make over those particular things, and no others: genus perire non censetur.

II. A money obligation is an obligation to make over a *sum* of money, to make over, that is, a certain quantum of *value*, not of things. Such an obligation can only be performed through the medium of money, in the legal sense of the term, i.e. through the medium of such things as are declared by law to be representatives of abstract value, to be—in short—'legal tender'. Modern Germany has adopted the gold standard. Within the German Empire only the imperial gold coins are money, in the legal sense; the silver, nickel, and copper coins are only money in a limited sense; they are only legal tender up to certain amounts. The one-dollar pieces are treated by a fiction as gold coins. Bank notes and treasury bills are money in the economic sense only: though they are used, in point of fact, as representatives of abstract value, they are no

* *Translator's Note.* The author calls an obligation to provide a thing 'Sachschuld', and divides Sachschuld into 'Stückschuld' (or 'Speziesschuld') and 'Gattungsschuld' (or 'Genusschuld'), according as the thing is determined individually or generically.

more legal tender than foreign money is legal tender. A debtor, therefore, who desires to discharge a money obligation, can require his creditor to accept in payment whatever is money in the legal sense, but he cannot require the creditor to accept anything else. A money obligation is not an obligation to make over a certain quantity of definite things. If A owes B one hundred marks, he does not owe B a hundred one-mark pieces—that would be to owe a quantity of res fungibiles—on the contrary, B could decline to take the hundred one-mark pieces in payment. What A owes is one hundred marks *value*, and this value A can pay in imperial gold coinage of any kind: in five twenty-mark pieces or ten ten-mark pieces, in one twenty-mark piece and eight ten-mark pieces, and so forth. Of course an agreement may provide for the payment of coins of a particular kind; I may, for example, stipulate for payment of one twenty-mark piece or of twenty one-mark pieces. But an obligation to pay coins of a particular kind would not be a *money* obligation, but an obligation to provide a certain number of res fungibiles, differing in no way from an ordinary obligation to provide a thing other than money. For a person who owes money does not owe any particular coins; he simply owes a *sum* of money, i. e. a certain quantum of value, which he can pay in the form of any legal tender he chooses. The difference between an obligation to pay money and an obligation to provide any other res fungibiles becomes material in distinguishing a contract of sale from a contract of exchange (cp. infra, p. 396, n. 1).

III. An 'alternative obligation' occurs where the debtor is bound to perform either one or the other of two acts. In the absence of an agreement to the contrary, the choice rests with the debtor. If performance of one of the acts becomes impossible, the debtor is not thereby discharged, even if the impossibility is due to an event for which he is not answerable. The effect of the impossibility is merely to convert his alternative obligation into a simple obligation to perform the other act. For in the case of an alternative obligation both the acts are 'in obligatione', that is, both are alike the object of the obligation. On the other hand, where the agreement merely is that the debtor shall be entitled to discharge himself by doing something different from what he had primarily contracted to do—where, for instance, he is entitled to pay a sum of money instead of providing a thing—there the obligation is not alternative.

In such a case the substituted performance is not 'in obligatione', but merely 'in solutione', that is to say, it is a sufficient performance of the obligation, but is not the object of it. In this instance, if performance of the primary act is rendered impossible by some event for which the debtor is not answerable—e. g. by the accidental destruction of the thing he had undertaken to provide—he (the debtor) is discharged.

§ 76. *Stricti Juris Negotia and Bonae Fidei Negotia.*

The effect of some contracts is to produce a liability which is precisely determined and accurately defined. The effect of others is to produce a liability which is not precisely determined nor accurately defined and which is (at the outset at least) indefinable. Contracts of the former kind are called stricti juris negotia, contracts of the latter kind bonae fidei negotia.

Stricti juris negotia are contracts which bind the parties to the exact performance of that which they promised. The Roman stipulatio (which may be compared to a modern bill of exchange, infra, § 80) furnishes an example. Stricti juris negotia are interpreted literally. Nothing is due that has not been promised. The contents of the obligation which they create are a matter of calculation and can be accurately determined. A stricti juris negotium may give rise to a so-called 'certa obligatio'. A 'certa obligatio', within the meaning of Roman law, occurs in the case of an 'obligatio dandi', i. e. an obligation in which the duty of the debtor consists solely in procuring the ownership of a definite thing (certam rem dare), or a civil law jus in re (a servitude) over a definite thing, or in procuring the ownership of a fixed quantity of res fungibiles, or a fixed quantum of value (certam pecuniam dare). An 'incerta obligatio', within the meaning of Roman law, occurs in the case of an 'obligatio faciendi', i. e. an obligation binding the debtor to perform any other act, e. g. to return to the creditor a thing which already belongs to him. When a person binds himself by stricti juris negotium 'dare certam rem', the resulting obligatio is 'certa' in the full sense of the term. Nothing more is due than what has been promised. The *value* of the obligation can be objectively ascertained.[1]

[1] In Roman law, therefore, 'certa obligatio' means an obligation the *value* of which is certain from the outset, and 'incerta obligatio' means an

the non-performance or misperformance, on the one hand, and the damage suffered, on the other hand, are connected as cause and effect, and where, further, the debtor is liable for such non-performance or misperformance, in other words, where the non-performance or misperformance is due to some circumstance for which the debtor is *answerable*. The limits within which the debtor is answerable are determined by the rules as to diligentia which have just been explained (supra, sub-sec. 1). Generally speaking, therefore, the debtor is answerable for dolus and culpa levis. He is not answerable for 'casus', or accident, that is, for anything happening without dolus or culpa levis on his part, e. g. for the creditor's own default: casus a nemine praestatur. Accordingly, if an accident renders performance on the debtor's part impossible—if, for example, the particular thing he was bound to procure is accidentally destroyed—the debtor is discharged (cp. supra, p. 365).

The limits within which the debtor is answerable are modified by 'mora', or delay. There may be delay on the part either of the creditor—delay, namely, in accepting performance, 'mora accipiendi'—or delay on the part of the debtor, delay, namely, in performing 'mora solvendi'. Mora accipiendi occurs where the creditor refuses to accept a proper tender of the performance due, and its effect is, not indeed to discharge the debtor entirely, but to diminish the degree of care required of him, he being no longer answerable for culpa levis, but only for dolus and culpa lata, while the creditor becomes liable to compensate him for any damage occasioned to him by the mora, e. g. for any additional expense he may incur in keeping the thing. Mora solvendi occurs where the debtor fails, without just cause, to perform what is due from him under the contract. A debtor who is in mora solvendi must pay compensation for all damage caused by the mora—he must, for example, pay interest on account of the delay—and is further answerable for casus as long as he remains in mora ('perpetuatur obligatio'), unless indeed the accident to which the damage was due would have occurred in any event, even if performance had taken place in proper time, in which case there would, of course, be no causal connexion between the mora and the damage. According to Roman law a debtor was not deemed in mora solvendi the moment the debt became due (ex re); in addition to the debt's being due there had to be a demand (interpellatio) on the part of the creditor.

L. 32 pr. D. de usur. (22, 1) (MARCIANUS): Mora fieri intelligitur non ex re sed ex persona, id est, si interpellatus opportuno loco non solverit.

The rules as to diligentia, 'interest,' and mora were developed by Roman law in connexion with bonae fidei negotia only, and had no application to stricti juris negotia (cp. supra, p. 269). In modern German law they apply to all obligations alike, the principle as laid down in the German Civil Code (§ 242) being that in every obligation the duties of the parties shall be measured by the standard of mutual good faith. The antithesis between stricti juris and bonae fidei negotia, in the Roman sense, has no place in the law of modern Germany.

II. THE MODES IN WHICH OBLIGATIONS ARISE.

§ 77. *Contracts and Delicts.*

An obligation arises either from a declaration of consensus, i. e. ex contractu, or from an act done in contravention of the law, i. e. ex delicto. In the former case the obligation arises by virtue of the will of the debtor, in the latter case it arises contrary to the will of the debtor.

Besides the obligationes ex contractu, we have the cases of what are called 'obligationes quasi ex contractu', which arise from facts bearing a certain resemblance to contracts. Besides the obligationes ex delicto we have the cases of what are called 'obligationes quasi ex delicto', which arise from facts bearing a certain resemblance to delicts.

A. CONTRACTUAL OBLIGATIONS.

§ 78. *Introduction.*

Roman law adhered all along to the principle that not every promise which is intended to create an obligation is legally valid and actionable. In order that such a promise may be legally valid and actionable, Roman law requires, in addition to the promise, some definite ground recognized by the law, a so-called causa civilis. Hence the somewhat restricted sense in which the term 'contractus' is used in Roman law. A contract in the Roman sense is not any declaration of consensus that is intended to create

an obligation, but only a declaration of consensus that results in an obligation actionable by the civil law.

A promise which is intended to create an obligation may become actionable by the civil law in one of four ways: (1) re, i. e. by the fact that, in addition to the obligatory consensus, there is a delivery of property (res) by one party entitling him to claim a re-delivery or counter-performance (as the case may be) from the other (Real Contracts, § 79); (2) verbis, i. e. by the fact that the obligatory consensus is orally expressed in a particular form, viz. in the form of a question and answer (Verbal Contracts, § 80); (3) literis, i. e. by the fact that the obligatory consensus is expressed in the form of an entry in the domestic account-book (Literal Contracts, § 81); (4) in certain exceptional cases by a simple obligatory consensus, without more (Consensual Contracts, § 82).

These four classes of contracts constitute the contractual system of Roman law.

The oldest times did not possess the same variety of contracts.

The most important contract in early Roman law was nexum, a formal money loan effected in solemn terms (damnas esto dare) per aes et libram, in the presence of five witnesses and with the assistance of a libripens (supra, p. 50). By virtue of the old law regulating the execution of debts, the debtor became answerable with his own person for the repayment of the debt (p. 51). It was on account of this stringent mode of execution that nexum continued to be employed even after coined money had been introduced, and the piece of aes weighed out by the libripens had thus been deprived of its value as money. The actual payment of the loan was henceforth a matter independent of the nexum, but the use of the forms of nexum continued to confer on the creditor (the lender) the full powers of execution with which the early law had armed him. When subsequently the lex Poetelia mitigated the rigour of the old law of execution (supra, p. 287), nexum gradually fell into disuse. Nothing remained but an informal contract of loan called 'mutuum'. In order to constitute a mutuum, all that was required was that one person should deliver something to another by way of loan. The subject-matter of mutuum was not necessarily money; it might be any res fungibilis. There might, for example, be a mutuum of corn. And this contract of mutuum, which had now come to be recognized as actionable, was a 'real'

contract bearing the characteristic features of the new law—the jus gentium—which was, at this time, in course of development, and the only trace it retained of its early associations was to be found in the fact that it was treated as a stricti juris negotium, i. e. in the fact that the sole duty of the debtor in a contract of mutuum, as such, was to repay the exact amount he had received, neither more —he was, for example, never bound to pay interest (infra, pp. 383, 388)—nor less.[1]

Besides nexum, but designed for quite different purposes, a second kind of contract came into use, viz. the so-called mancipatio fiduciae causa, which gave rise to an actio bonae fidei called the actio fiduciae (supra, p. 61). Just as a mancipatio fiduciae causa could be utilized for purposes of a contract of pledge (supra, p. 352), so it might be utilized—in the shape of a fiducia cum amico contracta (supra, p. 60)—for purposes of a depositum (the thing being mancipated to a friend fiduciae causa), or of a commodatum, in short, for purposes of any kind of contract—such as mandatum, hire, and others—where one person delivered a thing to another subject to a duty in that other to restore it. The drawback in all these cases alike was that, although the practical result contemplated by the parties was to make the person receiving the thing, not owner, but only pledgee, depositarius, commodatarius, and so forth, nevertheless ownership had to be formally transferred to him by means of the mancipatio. The party who delivered the thing was therefore always confined to a personal right to recover the thing from the person who first received it, or from the heir of that person; in other words, he was confined to a mere obligatory right, because the effect of the mancipatio was to deprive him of his ownership. But just as, in lieu of mancipatio for purposes of a pledge, a mere agreement to create a right of pledge was, at a later time, directly acknowledged as valid, so it came to be held that the mere giving up of a thing (for purposes of a commodatum or depositum), without any mancipatio and consequent transfer of

[1] As to the difference between nexum and mutuum, see W. Stintzing, *Beiträge zur röm. RG.*, p. 1 ff. The liability created by a mutuum could be enforced by legis actio per condictionem, the idea however being, perhaps, in the first instance that the defendant was liable simply because he had been unjustly enriched at the expense of another. The conception of mutuum as a juristic act creating *as such* a duty to repay the money lent (pecunia credita) was only the result of a gradual development; *ibid.*, p. 11; cp. supra, p. 233, n. 5.

ownership, was sufficient to establish a claim for its restoration. Mancipatio fiduciae causa was thus superseded by the 'nominate' real contracts (commodatum, depositum, pignus), all of which preserved their original character in so far as they were regarded as bonae fidei negotia.

Nexum and mancipatio fiduciae causa were the original sources of real contracts. In addition to these, sponsio gradually came to be employed for legal purposes. At the outset sponsio was a solemn vow coupled with a declaration by which the promisor denounced himself to the gods in the event of his not keeping his vow (cp. supra, p. 64 and note 16 *ibid.*). The old religious act was afterwards replaced by a mere verbal transaction (viz. a formal question and answer: spondesne? spondeo), and in this shape—in the shape, that is, of the verbal contract of Roman law, or 'stipulatio'—sponsio was invested with legal effects.

The Literal Contract was developed at a comparatively early period and obviously in connexion with loans. An entry by A in his domestic account-book that a certain sum had been paid by him to B (expensilatio)—an act which originally had merely evidentiary value—came gradually to be regarded as giving rise to a distinct and independent obligation. Like mutuum and stipulatio, expensilatio creates an obligatio stricti juris. Thus the original sources of the stricti juris negotia are to be found in a contract of loan (nexum) and a religious vow (sponsio), just as the origin of the bonae fidei negotia is to be found in the fiducia.

The development of the so-called Consensual Contracts, i.e. of those exceptional cases where the mere consensus without more is sufficient to create an obligation, is closely associated with the triumphant progress of the jus gentium (p. 69 ff.). It was natural that informal juristic acts should first assert their innate force within the domain of the law of obligations. For a considerable time prior to the close of the Republic the validity of the most important transactions of daily intercourse (sale, hire, partnership, mandatum) had been fully recognized by the law quite regardless of any question of form.

According to modern law a valid and actionable obligation of any kind can, as a rule, be created by mere informal consensus. The formalism of the early law has been finally superseded by the principle of the consensual contracts.

§ 79. *Real Contracts.*

Real contracts are contracts which are actionable on the ground of a delivery of property (res); cp. § 78.

Roman law distinguishes two kinds of real contracts: nominate and innominate real contracts. In a nominate real contract the person to whom the property is delivered is bound to give it back; in an innominate real contract, he is bound to give something else in return, performance and counter-performance being acts of a different kind.

I. Nominate Real Contracts.

Of nominate real contracts we have four: mutuum, commodatum, depositum, pignus.

(*a*) Mutuum, or Loan (for Consumption).

Mutuum arises where one person transfers a certain quantity of res fungibiles (supra, p. 305) to another, this other (the transferee) becoming owner of the things subject to an obligation to restore the same amount of the same quality as he had received. Mutuum is a stricti juris negotium; the action to which it gives rise is the condictio certi (supra, p. 373, n. 1). The contract of loan only binds the borrower to repay the exact amount of capital he received, neither more nor less; it does not bind him, more particularly, to the payment of interest. Even though he be in mora (having failed to pay his debt when due in spite of notice received from the creditor), he is not obliged to pay interest on account of such mora, nor again is he bound by a simple agreement to pay interest. If it is desired to make the debtor in a mutuum liable for interest as well as capital, a second contract is required in addition to the contract of loan, viz. a *verbal* contract, the stipulatio for payment of interest (infra, p. 383). In the case of a money loan—the true descendant of the ancient nexum—Roman law adhered all along strictly to these rules; in the case, however, of a loan of any other res fungibiles, the later Roman law treated an informal agreement for the payment of interest—a mere nudum pactum—as sufficient to create a legal duty to pay such interest.

The senatusconsultum Macedonianum forbade loans of money to filiifamilias. If a filiusfamilias was sued on a loan, the praetor allowed him to plead the exceptio senatusconsulti Macedoniani (cp. p. 277).

In order that a contract of mutuum may come into existence, it is essential that there should be consensus, in other words, that the parties should be at one as to the facts of the loan. If they are not at one—if, for example, the borrower thought he was receiving the loan from some person other than the actual lender—the lender cannot enforce repayment of the money lent by an action on the loan, and his only remedy is to sue by condictio sine causa (called, in this case, the 'condictio Juventiana', cp. l. 32 D. 12, 1) for a return of the amount by which the borrower has been enriched (cp. infra, p. 409).

(*b*) Commodatum, or Loan for Use.

Commodatum arises where A (the lender) delivers a thing to B (the borrower) to the end that B shall use it gratuitously[1] in a specified manner. The borrower does not here become owner of the thing. Commodatum is a bonae fidei negotium. Both parties are bound to do all that is required by bona fides. In the first place, and in all cases, the borrower (commodatarius) has a duty towards the lender (commodans): he is bound to re-deliver the thing. If he fails in this duty, the lender has the actio commodati directa. It is only in certain circumstances that the lender incurs a liability as against the borrower. The borrower can enforce this liability by the actio commodati contraria. Nor do the requirements of good faith impose the same duties on both the parties. The borrower is the party interested in the contract. It is he who has the benefit of the transaction. He is bound, therefore, even without having given any promise to that effect, to exercise omnis diligentia, i. e. he is liable for culpa levis (supra, p. 368). The lender, on the other hand, is not interested in the contract. He derives no benefit from the transaction. Hence he is only liable for dolus and culpa lata.

(*c*) Depositum, or Bailment.

Depositum arises where A delivers a movable thing to B for the purpose of gratuitous safe-keeping.[2] It is a bonae fidei negotium.

[1] Where A lets B have the use of a thing in consideration of a money payment by B—as where B borrows a book from A's circulating library—the contract is a locatio conductio (rei), and is therefore a consensual contract. Unlike the lender in a commodatum (see the text), the locator in a locatio conductio is liable for omnis diligentia, a distinction which becomes important in cases where the hirer is injured by the thing (e. g. a horse) he has hired.

[2] Where the safe-keeping is undertaken by B in consideration of a money

Both parties are bound to do all that is required by bona fides. In the first place, and in all cases, the depositary (i. e. the receiver of the depositum) has a duty towards the depositor: he is bound to re-deliver the thing deposited. If he fails in this duty, the depositor has the actio depositi directa. It is only in certain circumstances that the depositor incurs a liability as against the depositary. The depositary can enforce such a liability—a liability, for example, to compensate him for expenses incurred in connexion with the thing—by the actio depositi contraria. Here too the duties imposed on each party by the requirements of good faith are not the same. The depositary is not interested in the contract. He derives no benefit from the transaction. Hence he is only liable for dolus and culpa lata. The depositor, on the other hand, is interested in the transaction. It is for his benefit that the contract exists. Hence he is bound to exercise omnis diligentia, i. e. he is liable to the depositary for culpa levis, and is bound to compensate the depositary for all expenses incurred in connexion with the thing.

A 'depositum irregulare' arises where one person delivers res fungibiles to another for safe-keeping on terms that the person receiving the things shall return, not the identical things (as would be the case with a depositum regulare), but merely the same quantity of the same quality of things as he received. A depositum regulare (in which the things deposited may conceivably be res fungibiles) creates an obligation to make over an individually determined thing, a depositum irregulare creates an obligation to make over things determined by reference to a class (cp. supra, p. 365). In a depositum regulare all that passes to the depositary is detention, in a depositum irregulare the depositary becomes owner of the things deposited. A depositum irregulare—such as arises e. g. in the case of a deposit in a savings-bank—is akin to a loan, but must nevertheless be distinguished from it. For whereas the object of a loan is the obtaining of credit, the object of a depositum irregulare is the safe-keeping of the things deposited. A depositum irregulare, again, is, like any other depositum, a bonae

payment by A—as in the case of luggage deposited in the cloak-room of a railway company—the contract would, according to Roman law, be a locatio conductio operis (infra, p. 405). According to the law of the German Civil Code a depositum need not necessarily be gratuitous. The 'Lagergeschäft', or 'warehousing agreement', of the German Commercial Code is an example of a non-gratuitous depositum.

fidei negotium. If therefore the depositary is 'in mora solvendi', he must pay interest on account of such mora; indeed, he must compensate the depositor for all loss directly caused to him by the mora solvendi. For the same reason a mere informal agreement at the time of the deposit is sufficient to bind the depositary to pay interest.[3]

(*d*) Pignus, or Pledge.

Pignus arises where a thing is delivered by way of pledge. We have already discussed pignus (supra, pp. 353, 354), as far as the *real* right of pledge is concerned which the creditor acquires in the thing pledged. But the delivery of the thing, besides giving the creditor this real right, gives the debtor (the pledgor) an obligatory right against the pledgee personally, the right namely to recover the thing pledged. It is in this sense that we speak of a *contract* of pledge, and we are here only concerned with pignus in so far as it gives rise to such a contract. Like commodatum and depositum, pignus is a bonae fidei negotium. It binds both parties to do all that is required by bona fides. In the first place the pledgee has a duty towards the pledgor, the duty, namely, to restore the pledge as soon as the debt it was intended to secure is discharged, or—if he has exercised his right of sale—to hand over the balance after paying himself out of the proceeds (hyperocha, supra, p. 356). The pledgor has the actio pignoraticia directa. It is only in certain circumstances that the pledgor incurs a liability as against the pledgee, e. g. to compensate him for expenses incurred in connexion with the pledge. In such cases the pledgee has the actio pignoraticia contraria. In this instance both parties are interested in the contract by means of which one obtains credit, the other security. Hence both parties are answerable for omnis diligentia.

II. Innominate Real Contracts.

In addition to the real contracts just enumerated certain other real contracts, the so-called innominate real contracts, became actionable at a later period. The Romans, namely, adopted the principle that, wherever there were mutual promises of mutual performance, the party who had performed his promise should, on the ground of such performance, be entitled at once to exact counter-performance from the other. The action, in such cases, was based, not on the consensus as such, but on consensus coupled with

[3] Mitteis, *ZS. d. Sav. St.*, vol. xix. p. 209 ff.

a delivery of property, coupled, that is, with performance (res); in a word, it was based on a *real* contract. But since the nature of the acts to be respectively performed might vary indefinitely, no fixed general name applicable to all cases of this kind came to be adopted. Hence they are called nowadays 'innominate' real contracts.

It was in the form of an innominate real contract, on the principle just explained, that Exchange became actionable in Roman law.[4] The Corpus juris distinguishes four categories, differing according to the nature of the acts to be respectively performed: do ut des, do ut facias, facio ut des, facio ut facias. The action by which a person who has performed his part claims counter-performance on the ground of his own performance is called the actio in factum praescriptis verbis or actio in factum civilis (cp. p. 258, n. 1).[5]

[4] The so-called contractus aestimatorius is another example of an innominate real contract. A contractus aestimatorius arises where one person delivers a thing to another for the purpose of sale at an assessed price (rem aestimatam vendendam dare). The person to whom the thing is delivered is bound either to return the thing or to pay the assessed price. If he sells the thing at a higher price, he keeps the surplus for himself. The obligation incurred is primâ facie an 'alternative' obligation; that is to say, the payment of the price is 'in obligatione' by way of alternative to the return of the thing. It follows that the periculum rei—the risk of loss through the accidental destruction of the thing—must be borne by the person receiving the thing. Cp. supra, p. 366.

[5] The two classes of real contracts—nominate and innominate—are in their essence radically different from one another. The nominate real contracts (which had their origin in nexum and fiducia) are all founded on a delivery of property to a person who is bound to return it. The property is delivered with a restriction—only by way of loan, commodatum, and so forth—and it is this restriction that creates the duty to return the property. The contract is effected 're', in the strictest sense, because the obligation of the debtor arises from the nature of the *delivery*, according as it is a delivery by way of loan, commodatum, deposit, or pledge. The duty to restore the property is not a duty to give something by way of counter-performance; it is merely a duty to observe the particular restrictions subject to which the delivery has been made. The case is quite different with the innominate real contracts. In them the property is delivered in order that something else may be given in return; they are contracts of exchange in the wider sense of the term. Here the obligation does not, as a matter of fact, arise from the delivery (res) as such—for the delivery is final and is made without any reservation, the contract itself not contemplating the return of the property—it arises rather from the *promise* of counter-performance given by the party receiving the property. In this case the res, or delivery, as such, tells us nothing either as to the ground or the nature of the obligation incurred by the party to whom the delivery is made. The innominate real contracts are contracts for a mutual exchange of performance and counter-performance, and are therefore, in their nature, similar to the consensual contracts, because the content of the obligation to which

Praescriptis verbis agere was not, however, a form of legal redress confined to cases of innominate real contracts. It served a much wider purpose, the purpose, namely, of generally supplementing the system of actions ex contractu. Wherever the traditional formulae of actions (i. e. the formulae already set out by the praetor in his album) were found to be inadequate, and yet the facts were clearly sufficient to establish a dare facere oportere ex bona fide, a formula with a demonstratio in factum concepta (l. 6 § 1 C. 2, 4: quae praescriptis verbis rem gestam demonstrat) was drawn up with special reference to the circumstances of the particular case. The demonstratio (cp. p. 265) set forth the actual facts—hence described as 'in factum' concepta—so far as they bore on the agreement concluded by the parties, in order that the judge, having regard to these facts, might condemn the defendant in 'quidquid ob eam rem dare facere oportet ex bona fide', the intentio being accordingly juris civilis. This is what is meant by 'praescriptis verbis agere'—a proceeding available in all cases where, on the one hand, the existence of a liability is undoubted, but where, on the other hand, there are doubts concerning the legal nature of the underlying facts, in other words, concerning the possibility of making the agreement in question tally with any of the traditional categories of contracts. And that is just what occurred in regard to the innominate real contracts: the plaintiff was obliged to sue for counter-performance praescriptis verbis, because there was no settled category, no fully developed pattern—such as existed in the case, say, of a loan, a deposit, or a sale—for the facts of the contract he was

they give rise is determined solely by the mutual promises of the parties. The fact that in Roman law these contracts of exchange were formally classed as real contracts—counter-performance being enforceable only on the ground of a previous performance by the party demanding it—is entirely due to the narrowness of the positive civil law of Rome, according to which simple consensus was only actionable in certain exceptional cases. The nominate real contracts, on the other hand, are 'real' in the fullest sense of the term: by the very nature of the case they are, and always will be, *real* contracts, because they all involve an entrusting of property by one person to another (with a duty in that other to restore it), so that the 'res', in this instance, determines both the ground and the nature of the obligation. Accordingly the nominate real contracts are real contracts to this very day: a claim for a return of property can only be supported on the ground of a previous delivery. But the innominate real contracts—contracts for mutual performance and counter-performance—have undergone a change: their true nature has gradually asserted itself, and modern law, which recognizes consensus on principle as actionable, treats them accordingly as consensual.

seeking to enforce. But precisely the same thing occurred in all the other cases where the fixed categories of the law were found to be too narrow for the exhaustless profusion of legal relations.[6]

pr. I. quib. mod. re contrahitur obl. (3, 14): Re contrahitur obligatio veluti mutui datione. Mutui autem obligatio in his rebus consistit quae pondere, numero mensurave constant, veluti vino, oleo, frumento, pecunia numerata, aere, argento, auro: quas res aut numerando aut metiendo aut adpendendo in hoc damus ut accipientium fiant, et quandoque nobis non eaedem res, sed aliae ejusdem naturae et qualitatis reddantur. Unde etiam mutuum appellatum sit, quia ita a me tibi datur ut ex meo tuum fiat. Ex eo contractu nascitur actio quae vocatur condictio.

§ 2 eod.: Item is cui res aliqua utenda datur, id est commodatur, re obligatur et tenetur commodati actione. Sed is ab eo qui mutuum accepit longe distat. Namque non ita res datur ut ejus fiat; et ob id de ea re ipsa restituenda tenetur. Et is quidem qui mutuum accepit, si quolibet fortuito casu quod accepit amiserit, veluti incendio, ruina, naufragio, aut latronum hostiumve incursu, nihilo minus obligatus permanet. At is qui utendum accepit sane quidem exactam diligentiam custodiendae rei praestare jubetur, nec sufficit ei tantam diligentiam adhibuisse, quantam suis rebus adhibere solitus est . . . Commodata autem res tunc proprie intellegitur, si, nulla mercede accepta vel constituta, res tibi utenda data est.

[6] The following examples will illustrate the manner in which the procedure praescriptis verbis was adapted to different purposes. A delivers a thing to B for purposes of valuation (l. 1 § 2 D. 19, 5), or of inspection (l. 23 eod.). These being neither cases of depositum (because the thing is not delivered for safe-keeping) nor of commodatum (because it is not delivered for use), the plaintiff must proceed praescriptis verbis. Or again, if it is doubtful whether the facts of a case constitute a contract of locatio conductio (l. 23 D. 10, 3), and, if they do, whether it is a locatio conductio rei or a locatio conductio operis (l. 1 § 1 D. 19, 5), the plaintiff must sue praescriptis verbis. In the same way proceedings praescriptis verbis must be resorted to where a donor wishes to enforce a trust expressly accepted by the donee in his (the donor's) favour (a trust, say, binding the donee to pay for the donor's maintenance), or where a person who has performed his part under a compromise wishes to exact counter-performance from his adversary. Cp. also the contractus aestimatorius, supra, n. 4.—On the actio praescriptis verbis cp. Pernice, *Labeo*, vol. iii. p. 88 ff., and *ZS. d. Sav. St.*, vol. ix. p. 248 ff.; Gradenwitz, *Interpolationen in d. Pandekten* (1887), p. 122 ff. (with Lenel's remarks thereon in the *ZS. d. Sav. St.*, vol. ix. p. 181). Gradenwitz has succeeded in proving that the 'actio' praescriptis verbis owes its origin to the Byzantine jurisprudence, and that the compilers inserted it in the Corpus juris by means of an interpolation. The term used by the classical Roman jurists was never *actio* praescriptis verbis (it being just the essence of these cases that they were *not* covered by a fixed individual actio), but always praescriptis verbis *agere*, because the procedure in question was a general form of procedure available in cases of a widely different character.

Alioquin, mercede interveniente, locatus tibi usus rei videtur. Gratuitum enim debet esse commodatum.

L. 5 pr. D. de praescr. verb. (19, 5) (PAULUS): Naturalis meus filius servit tibi et tuus filius mihi. Convenit inter nos ut et tu meum manumitteres et ego tuum. Ego manumisi, tu non manumisisti; qua actione mihi teneris quaesitum est. In hac quaestione totius ob rem dati tractatus inspici potest qui in his competit speciebus: aut enim do tibi ut des; aut do ut facias; aut facio ut des; aut facio ut facias.

§ 80. *The Verbal Contract.*

The verbal contract of Roman law is called stipulatio. It arises 'verbis', i. e. by the employment of words in a particular form, in the form, namely, of question and answer. The creditor asks the debtor: spondesne mihi centum dare? The debtor answers: spondeo. This form of sponsio was regarded as specifically Roman (i. e. as being juris civilis), and could only be employed, therefore, among Roman citizens.[1] But instead of saying 'spondesne', the creditor might also use the word 'promittisne' or some similar term. And such forms were regarded as being juris gentium, and could therefore be validly employed by aliens as well as citizens. In Justinian's law it is immaterial what words are used. All that is essential is that the obligatory consensus shall be expressed in due legal form by a question on the part of the creditor and a corresponding answer on the part of the debtor. Given these conditions, the contract is valid and actionable on the ground of the form in which the words are put, and it is immaterial whether the debtor received any consideration for his promise or not. All that the creditor need prove is that, as a matter of fact, the stipulatio was concluded. The debtor's obligation rests on the verba and on them alone.[2]

[1] As to the manner in which sponsio was developed from a religious act v. supra, p. 64, n. 16. The fact that such a sponsio originally only gave rise to a moral obligation (an obligation towards the gods) left its traces even in classical Roman law, where certain kinds of stipulationes—e. g. the stipulatio by which a betrothal was effected (infra, p. 457)—were not enforceable by action.

[2] In its essence stipulatio is an oral contract. In the later Empire writing became, as a matter of fact, a requisite of stipulatio—a change which was due to the influence of Greek law. According to the law of the Corpus juris it was, as a rule, sufficient if a written memorandum (cautio) was drawn up attesting the fact that a promise had been made in the form of a stipulatio, i. e. in the form of a question and answer. Cp. infra, p. 395, n. 3.

In consequence of this its peculiar nature stipulatio fulfils a two-fold function, the function namely (1) of originating an obligation and (2) of transforming an obligation.

I. Stipulatio as originating an obligation.

Stipulatio serves the purpose of originating an obligation in so far as it is used to convert an informal promise into a formal one. An informal promise, as such, is not actionable according to the Roman law of contract (supra, p. 371). But as soon as a promise is clothed in the form of a stipulatio, it becomes actionable. By means of a stipulatio any promise can be raised to the rank of a 'contract'. The following are examples in point: a stipulatio for the payment of interest, a stipulatio for the payment of a specified penalty, and the contract of suretyship.

(1) *Stipulatio for the payment of interest.*

By interest is meant a certain percentage on capital payable by way of compensation for the use of the capital. If the debtor in a contract of loan gives an informal promise to pay interest, the promise is not actionable (supra, p. 375). Whenever it is intended to bind a borrower, on receiving his loan, to pay interest, a second contract is needed over and above the real contract of mutuum, viz. a verbal contract of stipulatio. The creditor asks the debtor: 'Will you pay me such and such monthly interest?' The debtor answers in the affirmative. He is now under an obligation to pay interest, an obligation which is actionable, not indeed *re* (for the contract of loan cannot create any obligation to pay interest), but *verbis*. The Romans were in the habit of calculating interest by the month, though it does not follow that it was paid by the month. The rate of interest is expressed as follows:—

centesimae usurae	= 1 %	per mensem	or 12 %	per annum.		
semisses	„	= $\frac{1}{2}$ „	„	or 6 „	„	
trientes	„	= $\frac{1}{3}$ „	„	or 4 „	„	
besses	„	= $\frac{2}{3}$ „	„	or 8 „	„	

The interest 'stipulated' for is not allowed to exceed a certain limit. The Twelve Tables fixed the maximum at $\frac{1}{12}$ of the capital (foenus unciarium). This was subsequently reduced to $\frac{1}{24}$ of the capital (foenus semunciarium). From the close of the Republic centesimae usurae became the usual legal maximum. Justinian finally fixed semisses usurae—apart from one exception—as the

highest allowable rate of interest in all cases. Anatocismus, or the payment of interest upon interest, is forbidden. A stipulatio for the payment of interest is void to the extent to which it exceeds the legal maximum. Arrears of interest can only be recovered to the extent of the capital debt, i. e. not 'ultra alterum tantum'.

(2) *Stipulatio for the payment of a specified penalty.*

A stipulatio for the payment of a specified penalty is an agreement determining the amount of the penalty to be paid by one of the parties in the event of his failing to perform, or improperly performing, a particular duty contemplated by the parties. Stipulationes of this kind were of considerable practical importance in Roman law. They were resorted to in all cases—such as the case of servitudes mentioned above (p. 344)—where a direct title according to the civil law could not be validly created, but where the parties felt the need of a title which should be legally secure.

(3) *Suretyship (Fidejussio).*

A contract of suretyship is a contract whereby a man binds himself to be personally answerable (i. e. answerable with his own credit) for the debt of another, as accessory debtor, in addition to the person principally liable.[3] An informal promise to the same

[3] In the oldest times 'vadimonium' served the purposes of a suretyship. Vadimonium was a solemn promise to pay a specified penalty, if a certain third party failed to meet a particular obligation, e. g. to pay a debt or to answer a summons before the court. A 'vas' is not a surety in our sense of the word, because the liability he undertakes is not the same as that of the principal, but is a new liability with *different* contents; cp. Voigt, *Die zwölf Tafeln*, vol. ii. p. 490 ff. On the other hand sponsio (which originated in the religious vows of the earliest times, v. note 1) is a suretyship in our sense of the term. When the forms of stipulatio were further developed, another kind of suretyship grew up side by side with sponsio, viz. fidepromissio. In the former the words used by the creditor were, 'idem dare spondes?', in the latter, 'idem fidepromittis?'. Sponsio, whether used for purposes of suretyship or for any other purpose, is invariably juris civilis; fidepromissio, on the other hand (like fidejussio), is also open to aliens. The youngest form of suretyship, and one which, from the very outset, was secular in character, is probably fidejussio (idem fide tua esse jubes?). Fidejussio (which is discussed in the text) is the only form of suretyship known in Justinian's law. Formally speaking, it implies neither a sponsio nor a promissio, but merely, in the most general way, a desire (jussio) that the principal debtor shall be given credit on the faith of the credit of the surety. Hence fidejussio was applicable to any liability (including e. g. a liability ex delicto), whereas sponsio and fidepromissio were only applicable to liabilities arising from a verbal contract (stipulatio). Again, the liability of a sponsor or fidepromissor, being originally of a purely religious character (cp. Pernice, *Berliner Sitzungsberichte*, vol. li. p. 1191), did not pass to his heir, and was moreover limited to two years

effect would, like an informal promise in the cases already mentioned, have been void by the civil law. Hence the forms of stipulatio were resorted to. The creditor asks: centum quae Titius mihi debet, eadem fide tua esse jubes? The surety replies: fide mea esse jubeo. The effect of such a fidejussio is to make the surety correal debtor (supra, p. 359 ff.) with the principal debtor, his correal liability being accessory to that of the principal, i. e. he (the surety) is liable *after* the principal debtor. That is the reason why the liability of the surety depends on the existence of the principal debt, and why, further, the surety has the 'beneficium excussionis' (sometimes called the 'beneficium ordinis')—not granted however till Justinian (Novel 4)—which consists in the right to demand that the principal debtor, if 'present' (i. e. capable of being sued) and solvent, shall be sued first. An epistola divi Hadriani gave several co-sureties the exceptio divisionis, i. e. the right to demand that the creditor should divide his claim pro rata between such sureties as were 'present' (i. e. capable of being sued) and solvent (supra, p. 363).

Suretyship is a species of what is called 'intercessio'. Intercessio means a liability incurred on behalf of a third party. The conception of intercessio is important, because the senatusconsultum Vellejanum (46 A. D.) prohibited women not only from becoming sureties, but from entering into any form of intercessio, thus debarring them, for example, from discharging a debtor by means of a novating stipulatio (infra, pp. 386–7), or from creating a mortgage or accepting a loan in the interests of a third person. A woman who

by the lex Furia de sponsu, 345 B. C. The liability of a fidejussor, on the other hand, passed to his heir, and the action against him was an actio perpetua. The same lex Furia further enacted that, as between several co-sponsors and co-fidepromissors, the debt guaranteed should be ipso jure divided according to the number of the sureties, regardless of the solvency of the individual sureties. Co-fidejussors, on the other hand, were severally liable for the whole debt. It was not till Hadrian that they obtained the beneficium divisionis, which operated however, in their case, not ipso jure, but only ope exceptionis (p. 363), the 'presence' and the solvency of the other fidejussores being moreover taken into account in determining the share of each (see text). Cp. GAJ. iii. § 115 ff. Everything points to the conclusion that whereas, from the very outset, fidejussio was possible even *after* the principal debt had come into existence, sponsio and fidepromissio could originally only be effected simultaneously with the sponsio of the principal debtor, i. e. by means of *con*spondere and *con*promittere. Hence the requirement of 'praedicere' which was subsequently imposed on the creditor (GAJ. iii. § 123).

was sued in respect of an intercessio of any kind—whether suretyship or any other—could plead the exceptio senatusconsulti Vellejani (cp. p. 277).

II. Stipulatio as transforming ('novating') an obligation.

Stipulatio serves the purpose of transforming ('novating') an obligation, wherever it is desired to replace a subsisting obligation by a new obligation based on stipulatio. The desire thus to transform an obligation may be due to an intention of changing the parties to the obligation, or it may be due to other reasons unconnected with any change of parties. In either case the obligation is said to be 'novated', i. e. renewed or transformed.

(1) *Novation with change of parties.*

Novation may result in a change of parties, the intention being to substitute a different creditor or debtor in place of the former one. For example: A declares himself willing to pay B's debt, and B's creditor agrees to accept A as his debtor in lieu of B. In such a case the effect of the promise given by A in the stipulatio—the so-called expromissio—is that B (the debtor) is released from his debt, possibly even without knowing it himself. The novating stipulatio operates to *transform* the debt. A's debt by stipulatio replaces B's debt under the contract of loan. In ordinary cases, the former debtor (B) is a party to a transaction of that kind. He may, for example, direct, or 'delegate', another person, who owes him money, to bind himself by stipulatio to pay the money to his (B's) creditor. And conversely, the person of the creditor may be changed, i. e. the stipulatio may be concluded in favour of a new third party. Where that is the case, a direction, or delegation, on the part of the previous creditor is indispensable in order that the new stipulatio may operate to extinguish the old debt. 'Delegation' is an instruction to do some act (whether it be dare, or promittere, or liberare) involving a change of parties.[4] The two examples of delegation just dealt with are cases of promittere; the delegans instructs the delegatus to conclude a stipulatio involving a change of parties.[5]

[4] The act to be performed in favour of the third party is intended to have the same force and effect as though it had been performed in favour of the delegans himself. A instructs B to pay X the 100 aurei which he (B) owes to A. In this case B (the delegatus) is instructed *dare*. Or: A instructs B to promise X (by stipulatio) the 100 aurei which he (B) owes to A. In this case B is instructed *promittere*. Or: A instructs B to pay him 100 aurei by releasing X from a debt of 100 aurei. In this case B is instructed *liberare*.

[5] Thus delegation only results in a novation (1) if the act required of the

(2) *Novation without change of parties.*

A novating stipulatio may, however, be designed to serve a particular purpose desired by the parties, without involving any change of debtor or creditor. For example: A owes money to B under a contract of sale. The sale is perfectly valid and actionable. Nevertheless, if B sues A on the sale, he may very possibly be compelled to go into all the facts of the case so far as they bear on the conclusion of the contract; he may be called on to prove that he has duly performed his part, and so forth. In these circumstances it is much simpler to resort to a stipulatio. As soon as the relationship of vendor and purchaser is completely established and both parties are agreed that a sum, say, of exactly 100 aurei is due by way of purchase-money, the vendor asks the purchaser: 'centum mihi dare spondes?' and the purchaser replies 'spondeo'. The result of the transaction is that the purchaser now owes 100 aurei by *a verbal contract*. The creditor need only allege and show that a stipulatio was concluded. The facts of the case, instead of being concrete, complicated, and open to all kinds of objections, are simple and unequivocal. Was there, or was there not, an *abstract* promise to pay, given in the form of a stipulatio? The purpose of the stipulatio, in this instance, is not to make the consensus actionable—for it is actionable in any case—but rather to make it actionable in a different and easier way. The force of the novating stipulatio is to convert a concrete liability into an abstract one, i. e. to convert a liability which rests on definite economic facts into one which is, as it were, cut off from its connexion with these facts. This result may be brought about, as we saw above (supra, under (1)),

delegatus is *promittere*, (2) if the delegation refers to an existing debt. But a delegation need not necessarily refer to a debt. It *may* be designed for other purposes, e. g. for the purpose of effecting a loan for the delegans (in which case the object of the delegation is to give credit), or of obtaining a gift for him.—The effect of a delegation is that the act done by the delegatus in favour of the delegatarius represents, in point of law, two acts: an act done by the delegatus in favour of the delegans, and an act done by the delegans in favour of the delegatarius. There is really only one act, the act namely of the delegatus (dare, promittere, &c.) in favour of the delegatarius, but this one act involves two performances (e. g. a discharge of two obligations): first, a performance in accordance with the legal relation subsisting between the delegatus and the delegans (the delegatus being, say, indebted to the delegans, or being minded to make him a gift), and, secondly, a performance in accordance with the legal relation subsisting between the delegans and the delegatarius (the delegans being, say, indebted to the delegatarius or being minded to make him a gift).

in such a manner as to involve, at the same time, a change of parties in regard to the liability in question. Such a change, however, is not essential for purposes of a novation. The mere fact that the parties themselves desire to change the ground of the action is sufficient to occasion, and to render possible, the conclusion of a novating stipulatio.

III. The nature of stipulatio and the remedies to which it gives rise.

Stipulatio is a stricti juris negotium, i. e. a contract resulting in a rigorously unilateral obligation. The promisor is bound to do precisely what he promised, neither more nor less. In the absence of an express undertaking to the contrary, he is not bound to exercise diligentia, nor to pay interest on account of mora, nor in any other way to compensate the creditor for an 'interest' of any kind. The stipulatio binds him to perform exactly what he promised and nothing more.

The action to which a stipulatio certi gives rise is a condictio; in other words, it is an actio stricti juris in the formula of which the legal ground of the action—in this case the stipulatio—is not specified. Where the defendant promises by stipulatio dare certam pecuniam, the condictio certi is employed; where he promises dare certam rem (other than pecunia) the condictio triticaria. Only where the object of the stipulatio is an incertum—only, that is, where the defendant promises a 'facere' (cp. supra, p. 367)—does the stipulatio give rise to a distinct action of its own: the so-called actio ex stipulatu, an actio stricti juris in which the formula expressly mentions the stipulatio as the ground of the action.[6]

[6] The formula in a condictio only names the *object* of the action (certa pecunia, certa res), not the *ground* (whether it be loan, stipulatio, or any other) on which the action is based. The condictio is thus an *abstract* action—an abstract action for the recovery of a certum, namely, and one which the creditor might bring on the greatest variety of grounds (cp. supra, pp. 233, 265). Wherever, therefore, the stipulatio was for something certain (certa pecunia or certa res), the only remedy was an action not specifying the ground on which it rested; in a word, a condictio, a kind of general action, the formula of which contained no reference whatever to the stipulatio as the basis of the action. (It is possible, however, that, in the case of a stipulatio for certa pecunia, there was a special action distinct from the condictio certi, viz. the condictio certae creditae pecuniae, an action necessarily founded on a transaction involving credit; cp. supra, p. 233, n. 5.) But wherever an incertum was promised, the plaintiff had the actio ex stipulatu, in which the stipulatio was named (in the demonstratio of the formula) as the ground on which the action was

IV. Adstipulatores and Adpromissores.

If the creditor in a stipulatio associates with himself another person who, in the interest of such creditor, stipulates for the performance of the same act by the debtor, this other person is called an adstipulator. He becomes a second (a correal) creditor concurrently with the true creditor, and is, as such, formally entitled to all the rights of a creditor. He is bound, however, not to abuse these rights (infra, p. 420, n. 4), it being more especially his duty to make over to the true creditor, or to the heir of the true creditor, whatever he may receive from the debtor. In substance, then, an adstipulator is merely an agent of the creditor. His rights consequently perish on his death, and if he is in the power of another person, his rights as adstipulator are not acquired by that person. Adstipulatio by a slave is void. Adstipulatio by a filiusfamilias only operates, if the filiusfamilias leaves the paternal power without capitis deminutio (supra, § 35). Adstipulatio is employed, for instance, when I desire to have a person who shall be, for all practical purposes, my representative, and shall moreover be entitled to proceed on his own account against the debtor. For an adstipulator is, formally speaking, not merely a representative, but is himself a creditor.[7] Or again, it is employed for the purpose of evading the prohibition which the law prior to Justinian imposed on stipulationes post mortem, i. e. on stipulationes for the payment of money after the death of the stipulator, in other words, for payment to the stipulator's heirs. This prohibition could be evaded by means of an adstipulatio in which the adstipulator was promised

brought (quod A^{us}. de N^{o}. incertum stipulatus est, quidquid ob eam rem N^{um}. A^{o}. dare facere oportet, condemna). L. 24 D. de reb. cred. (12, 1): Si quis *certum* stipulatus fuerit, *ex stipulatu actionem non habet*, sed illa condicticia id persequi debet per quam certum petitur.—In the Corpus juris we find a condictio *incerti*, which may accordingly be regarded as an abstract action for the recovery of an incertum. There is no doubt that the condictio incerti is of considerably later origin than the condictio certi; it is possible indeed that the compilers of the Corpus juris introduced it themselves as a pendant to the condictio certi, i. e. for the sake of symmetry. Cp. Pernice, *Labeo*, vol. iii. p. 203 ff.; Trampedach, *ZS. d. Sav. St.*, vol. xvii. p. 97 ff.; Pflüger, *ibid.*, vol. xviii. p. 75 ff. v. Mayr, *Die condictio* (1900), p. 180 ff. The view that the condictio incerti was recognized as early as the classical period is supported by H. Krüger, *ZS. d. Sav. St.*, vol. xxi. p. 423 ff., and W. Stintzing, *Beiträge zur röm. RG.* (1901), p. 20 ff.

[7] The use of this form of representation seems to have been particularly common in commercial dealings in Rome. There were people who acted as professional adstipulatores. Cp. Rümelin, *Zur Geschichte der Stellvertretung* (1886), p. 73; Karlowa, *Röm. RG.*, vol. ii. p. 738.

payment after the stipulator's death. Such a stipulatio was perfectly valid. If the adstipulator was living at the time of the death of the person for whom the payment was really intended, he could sue for the sum promised, and having recovered it, would hand it over to the heir of the deceased. In every case the adstipulator was in point of form (i. e. as against the debtor) a creditor; in substance, however (i. e. as against the creditor), he was a mere agent.

If the debtor in a stipulatio associates with himself another person who, in the interest of such debtor, gives the same promise by stipulatio, this other person is called an adpromissor. The chief case of adpromissio is fidejussio, which we have already discussed. Just as adstipulatio produces an active, so adpromissio produces a passive correal obligation.

pr. I. de verb. obl. (3, 15): Verbis obligatio contrahitur ex interrogatione et responsu, cum quid dari fierive nobis stipulamur. Ex qua duae proficiscuntur actiones, tam condictio, si certa sit stipulatio, quam ex stipulatu, si incerta. Quae hoc nomine inde utitur quia stipulum apud veteres firmum appellabatur, forte a stipite descendens.

§ 1 eod.: In hac re olim talia verba tradita fuerunt: SPONDES? SPONDEO.—PROMITTIS? PROMITTO.—FIDEPROMITTIS? FIDEPROMITTO. — FIDEJUBES? FIDEJUBEO. — DABIS? DABO. — FACIES? FACIAM. Utrum autem latina, an graeca, vel qua alia lingua stipulatio concipiatur, nihil interest, scilicet si uterque stipulantium intellectum hujus linguae habeat. Nec necesse est eadem lingua utrumque uti, sed sufficit congruenter ad interrogatum respondere; quin etiam duo Graeci latina lingua obligationem contrahere possunt. Sed haec sollemnia verba olim quidem in usu fuerunt; postea autem Leoniana constitutio lata est quae, sollemnitate verborum sublata, sensum et consonantem intellectum ab utraque parte solum desiderat, licet quibuscumque verbis expressus est.

§ 13 I. de inut. stip. (3, 19): Post mortem suam dari sibi nemo stipulari poterat, non magis quam post mortem ejus a quo stipulabatur Sed cum (ut jam dictum est) ex consensu contrahentium stipulationes valent, placuit nobis etiam in hunc juris articulum necessariam inducere emendationem, ut sive post mortem, sive pridie quam morietur stipulator sive promissor stipulatio concepta est, valeat stipulatio.

GAJ. Inst. III § 110: Possumus tamen ad id quod stipulamur alium adhibere qui idem stipuletur, quem vulgo adstipulatorem vocamus. § 117: Adstipulatorem vero fere tunc solum adhibemus cum ita stipulamur ut aliquid post mortem nostram detur: [quod]

stipulando nihil agimus. Adhibetur adstipulator ut is post mortem nostram agat; qui, si quid fuerit consecutus, de restituendo eo mandati judicio heredi meo tenetur.

§ 81. *The Literal Contract.*

Just as nowadays every business man keeps his business books, so in Rome every well-to-do citizen kept his domestic account-books. Of these the most important was the codex accepti et expensi, a cash-book in which the paterfamilias entered his cash receipts and cash payments. The normal entries in this book were cash items, 'nomina arcaria,' i. e. entries relating to moneys actually received or expended. It is obvious that an entry of this kind had at most evidentiary force and did not in any sense *create* an obligation. The obligation to which the entry related existed solely by virtue of a particular set of facts which had nothing to do with the codex, and the entry was, for legal purposes, immaterial. In addition to these nomina arcaria (which were originally most probably the only nomina in the cash-book) a second class of entries, called 'nomina transscripticia', subsequently came into use. These nomina transscripticia represent the literal contract of Roman law.

A nomen transscripticium consists in the entry of a *debt*; that is to say, it is not (in its practical aspect) an entry of anything that has actually taken place—a payment or a receipt—but an entry of a legal relationship, an entry, in other words, of the fact that the other party (the person with whom the contemplated legal relationship is to be effected) is *indebted* in a certain sum of money. This entry takes the form of an 'expensilatio'. The creditor makes an entry in his account-book to the effect that a certain sum has been paid by him to the debtor (expensum ferre). The debtor usually makes a corresponding entry in his book that he has received the sum in question from the creditor (acceptum ferre, or referre). Such an entry on the part of the debtor is not necessary. All that is necessary is that the creditor should make his entry by direction (jussus) of the debtor. But the creditor's entry—the expensilatio—is only in form an entry of a payment, an entry, that is, of something that has actually taken place. As a matter of fact there has been no expensum at all: the debtor has not received any money, nor has the creditor made any payment. The creditor's expensilatio

is the entry of a fictitious payment, but it is an entry made with the assent of the other party, an entry (in other words) made in virtue of an agreement and operating, of its own force, to create legal rights and liabilities; in short, it is an entry of an obligation, a legal relationship. And the peculiarity of the obligation thus effected is that the entry does not, on the face of it, give any clue to the material ground from which the obligation is derived—the obligation is, in that sense, an abstract, a colourless obligation—for the parties are agreed that, in point of fact, there has *not* been any expensum. The effect of such an expensilatio made by the creditor with the assent of the debtor is to impose a liability on the debtor, even though, as a matter of fact, he never received any payment at all. An entry has been made by his direction, debiting him with a certain sum, and it is on this entry alone that his legal liability rests. His obligation is a 'literal' obligation. He is bound 'literis', i. e. by the writing in the codex as such. He is not liable on a real contract—not, that is, on the ground of payment received—but on a literal contract.

A literal contract gave rise to a rigorously unilateral obligatio stricti juris. The action by which it was enforced was, as in the case of a stipulatio, a condictio (certi).

An entry of a payment (expensum) in the codex accepti et expensi might accordingly refer to one of two kinds of payment, either to an actual payment (in which case the item was a nomen arcarium) or to a fictitious payment (in which case the item was a nomen transscripticium). A nomen arcarium was an item entered without reference to any other person, and was devoid of legal significance; a nomen transscripticium was an item entered with the concurrence of both parties concerned: it was founded on agreement, and its effect was to *create* a legal liability. The term 'expensilatio' was applied to entries of both kinds. In point of form, the nomen arcarium and the nomen transscripticium were alike entries of a payment. The question therefore arises: What was there to distinguish one kind of expensilatio in the codex from the other? That is precisely the question as to which we have no certain information, and accordingly the truth can only be conjectured. The most important clue for determining the character of the fictitious expensilatio which constituted the literal contract of Roman law is to be found in the term nomen *transscripticium*. A nomen

arcarium consisted of a simple entry, a nomen transscripticium—as the word indicates—involved some process of 'writing over'. It is most probable that in the case of a nomen transscripticium, the expensum (on the pagina expensi) was an item 'written over', 'transcribed,' from the other side of the cash-book, the pagina accepti—we know for a fact that the codex was kept on a definite outward system according to acceptum and expensum—whereas in the case of a nomen arcarium, the expensilatio was really nothing more than an expensilatio, i. e. an independent entry of a payment on the pagina expensi. In other words, an expensilatio transscripticia, or literal contract, presupposed the existence of an obligation quite independent of the codex—an obligation based on a sale, or loan, or what not—and the object of the parties was to transform this pre-existing obligation into a literal obligation, i. e. into one based on the literae, or writing, in the codex as such. The procedure adopted was somewhat as follows: the creditor made an entry to the effect that the obligation in question had been cancelled by payment, i. e. he entered the sum due (on the pagina accepti) as *received*, and, at the same time, he made a second entry on the other side of the book—an expensilatio—debiting the other party with the amount in question, i. e. he entered that amount (on the pagina expensi) as *paid out* to the debtor. The acceptilatio had thus been 'transcribed' into an expensilatio, and it was an expensilatio of this kind—an entry 'transcribed' from the pagina accepti, a nomen *transscripticium*—that constituted the literal contract of Roman law. A nomen arcarium was merely a simple entry of an acceptum *or* an expensum; a literal contract, on the other hand, consisted of a combination of two kinds of entries, an acceptilatio *and* an expensilatio, the combination being effected by means of transcribing the acceptilatio into the expensilatio. The practical result of a literal contract was that an actual concrete obligation, existing quite apart from the codex, was cancelled by means of a fictitious receipt (acceptilatio), while, at the same time, another obligation, based on a fictitious loan (expensilatio), was constituted: what was previously due under a contract (say) of sale was henceforth due by virtue of a 'loan'. The literal contract of Roman law was a fictitious loan which operated by virtue of the literae—i. e. by virtue of the writing in the codex as such, irrespectively altogether of the facts actually underlying the relations between the parties—

to impose on the debtor an abstract liability to pay a fixed sum of money.[1]

If this view is correct, it follows that a literal contract was employed in Roman law, not for the purpose of originating an obligation, but solely for the purpose of transforming an existing obligation into one based on an entry in the codex. As in the case of a stipulatio, so here, the object of thus transforming an obligation might be to effect a change (1) in the parties (transscriptio a persona in personam), or (2) in the ground of the obligation (transscriptio a re in personam).

Just as a literal obligation could only be produced by a written entry (expensilatio), so, in the early law, it could only be extinguished by an act of cancelling (acceptilatio; cp. infra, pp. 435, 436). Acceptilatio in the codex accepti et expensi (i.e. a 'literal' acceptilatio) was the counterpart of expensilatio. The creditor made an entry to the effect that the money had been paid by the debtor, in other words, he entered the money as received (acceptum ferre). The effect of this entry was to cancel *literis* the obligation which had been previously created literis (by the expensilatio). The entry did not necessarily imply that the debtor had actually paid the money. Like expensilatio a 'literal' acceptilatio was the record of a legal relationship. It meant that the debtor was discharged from his debt, and it accomplished the discharge by the act of cancelling—the acceptilatio in the codex—as such; that is to say, *literis*. Thus a literal acceptilatio might also be employed for effecting a contract of release. But it was only a literal obligation that could be discharged by means of a literal acceptilatio.

[1] The view expounded in the text is based on the arguments of Keller in Sell's *Jahrbuch f. historische u. dogmatische Bearbeitung d. röm. Rechts*, vol. i. (1841) p. 93 ff., and in his *Institutionen* (1861), p. 102 ff. As to Keller's theory see also Mitteis, *ZS. d. Sav. St.*, vol. xix. (1898) p. 239 ff.; Karlowa, *Röm. RG.*, vol. ii. p. 746 ff.—There is no doubt that the Romans were in the habit of keeping other kinds of books besides the codex accepti et expensi. There was, for example, the kalendarium, or liber kalendarii, in which an account was kept of moneys lent out at interest (the name 'kalendarium' was due to the fact that, in Rome, interest was paid, as a rule, on the first day of every month, the 'kalendae'), and there were other books for registering the facts concerning the paterfamilias' general proprietary position, the object of the codex accepti et expensi as such being merely to record his *cash* transactions. It was customary to make a preliminary entry in a rough day-book or waste-book (adversaria, ephemeris), before making the entry in the codex accepti. Every month these entries were posted from the day-book into the codex.

In order that such an acceptilatio might extinguish an obligation, it was necessary that the latter should have been created by a prior expensilatio. An acceptilatio in the codex accepti et expensi, which was not based on a prior expensilatio, was merely the record of a fact, and did not constitute a juristic act.[2]

In the course of the Empire the literal contract fell into disuse. Stipulatio thus became the only means by which the novation of an obligation could be effected, or by which a consensus, in itself not actionable, could be rendered actionable.[3]

[2] It is to be observed that the same principle underlies the case of a nomen transscripticium, where the essence of the juristic act is to be found, not in the acceptilatio—the entry that the money due (say) on a sale has been received—but in the expensilatio, i. e. in the nomen *transcribed* from the other side of the codex. An entry stating that a sum due in respect of some other transaction (e. g. a sale) has been received, is never, taken by itself, anything more than a nomen arcarium, or cash item. In order to constitute a juristic act, an acceptilatio must be an entry 'transcribed' from an expensilatio; it must be, in that sense, a nomen transscripticium.

[3] Greek law had gradually developed a literal contract of its own, which was concluded by means of a bond called 'syngraphe' or 'chirographum'. As a rule a syngraphe was a written document purporting, on the face of it, to be an acknowledgement of the receipt of a loan, which loan, however, was in fact fictitious. The liability of the debtor was based entirely on the bond he had executed, just as, in modern law, liability on a bill of exchange is based entirely on the bill itself. It is to this feature of the Greek contract that Gajus (iii. § 134) refers: Praeterea litterarum obligatio fieri videtur chirographis et syngraphis, id est, si quis debere se aut daturum se scribat; ita scilicet si eo nomine stipulatio non fiat, quod genus obligationis proprium peregrinorum est. In consequence of the extension of the Roman franchise and, with it, of the Roman civil law to the entire Empire by Caracalla (p. 110), the Greek law of syngraphae was displaced by the Roman law of stipulationes; that is to say, the rule which till then had obtained in the West—viz. that an abstract promise, operating of its own force to impose a legal liability on the promisor, could only be validly made by means of an *oral* stipulatio—was now extended to the Eastern or Greek portion of the Empire. Nevertheless, the influence of Greek legal habits survived, and found expression in the ever-increasing importance that came to be attached to the 'cautio', or written memorandum, which was usually drawn up in connexion with the oral promise. If the plaintiff produced a written memorandum to the effect that 'stipulatus est Maevius, spopondi ego Lucius', a legal presumption was thereby raised that the oral stipulatio had been duly carried out, and the only way in which, in the law of Justinian, the defendant could rebut such a presumption was by showing that one of the parties concerned had in fact been absent all day from the place where the stipulatio was alleged to have been concluded, and that it was consequently impossible that the requirements of an oral stipulatio should have been complied with. The underlying principle therefore remained the same as before: it was not the memorandum (the literae), but the stipulatio (the verba) that constituted the essential foundation of the debtor's liability. But in the great majority of cases this principle was only saved by the help of a fiction. As a matter of fact the provisions of the Corpus juris itself show that Roman law had already gone some way towards abandoning the

GAJ. Inst. III § 128: Litteris obligatio fit veluti nominibus transscripticiis. Fit autem nomen transscripticium duplici modo: vel a re in personam, vel a persona in personam. § 129: A re in personam transscriptio fit, veluti si id quod tu ex emptionis causa aut conductionis aut societatis mihi debeas, id expensum tibi tulero. § 130: A persona in personam transscriptio fit, veluti si id quod mihi Titius debet, tibi id expensum tulero, id est, si Titius te delegaverit mihi.

§ 131 eod.: Alia causa est eorum nominum quae arcaria vocantur: in his enim rei, non litterarum obligatio consistit; quippe non aliter valent quam si numerata sit pecunia; numeratio autem pecuniae re facit obligationem. Qua de causa recte dicemus arcaria nomina nullam facere obligationem, sed obligationis factae testimonium praebere.

§ 82. *Consensual Contracts.*

In certain cases Roman civil law acknowledges an exception to the rule that a bare obligatory consensus is not actionable. In these cases the rule accordingly is: consensu contrahitur. Roman civil law recognized four such consensual contracts: sale, hire, partnership, mandatum.

1. Emtio Venditio, or Purchase and Sale.

Sale is a contract whereby one party (the vendor) binds himself to make over a thing, and the other party (the purchaser) binds himself to pay a sum of money, called 'the price'. The 'thing' may be a material thing, or any other thing capable of being transferred, e.g. an obligatory right. The contract is valid the moment the parties are agreed in regard to the thing to be made over and the price to be paid. It requires neither form nor one-sided performance. It is this that distinguishes sale, according to Roman law, from exchange (supra, p. 379).[1] Sale is a bonae

law of verbal contracts in favour of the system traditionally employed by the Greeks from the oldest times in their legal transactions, the system namely of utilizing written acknowledgements of a debt for the purpose of effecting binding agreements.—An instructive account of this subject is to be found in Mitteis, *Reichsrecht u. Volksrecht in den östlichen Provinzen des röm. Kaiserreichs* (1891), p. 459 ff.

[1] The practical difference between sale and exchange—the latter being in modern law, like sale, a consensual contract—consists in the fact that a contract of sale imposes on one of the parties (the purchaser) an obligation to pay money and on the other (the vendor) an obligation to make over a thing, whereas a contract of exchange binds both parties alike to make over a thing. Now a money obligation means, as already explained (supra, p. 365), an obligation to pay a *sum* of money (i. e. a certain quantum of

fidei negotium, i. e. both parties are bound, not merely to do what they expressly undertook to do, but to do all that is involved in the requirements of good faith. Sale is, further, a contract giving rise to reciprocal obligations. Each party promises something to the other: the vendor the thing and the purchaser the price. The intention is that there shall be a mutual exchange of performance and counter-performance. Unless, therefore, the parties agree otherwise, performance and counter-performance must take place simultaneously. The claim arising from a contract of sale is not a claim for performance simply; it is a claim for performance in return for counter-performance. If one party were to sue for performance without having himself performed his part, or without tendering performance of his part—if, for example, the purchaser were to sue for the thing without having paid, or tendered, the price—the other party, who is under no obligation to perform first, could plead the exceptio non adimpleti contractus.

The vendor's remedy against the purchaser is the actio venditi.

value), and, as such, it must be carefully distinguished from an obligation to pay any particular coins. A purchaser, then, is only bound, as such, to pay a sum of money; he is never bound to pay any particular coins. If the agreement was that the thing bought should be paid for in coins of a specified kind—say, in sovereigns or in particular foreign coins—the transaction would be an exchange, not a sale. And conversely: the vendor is never bound to pay a *sum* of money, but it is quite possible that he may be bound to pay particular coins. There is no reason why money—in the shape, namely, of specific coins, whether coins of the country or foreign coins—should not be *bought*, but it is impossible to buy a *sum* of money. Accordingly where coins are the subject-matter of a transaction, the question whether the latter is a sale or an exchange will depend on the nature of what is to be given in return. If I desire to acquire a sovereign piece and bind myself to pay twenty shillings *value* for it, i. e. to pay a *sum* of twenty shillings (which I can do in any silver coins—shillings, florins, half-crowns, &c.—I choose), the transaction amounts to a *purchase* of the sovereign piece. If, on the other hand, I bind myself to pay (say) twenty one-shilling pieces or ten two-shilling pieces for the sovereign, if, in other words, the coins to be given by me are specifically determined, the transaction would amount to an exchange. The same distinction of course holds good where money is changed at a banker's. A transaction between a money-changer and his customer is primâ facie a sale, because one party has to pay a sum of money and the other has to deliver coins of a particular kind, e. g. twenty-franc pieces. It is obviously inaccurate therefore to speak of a sale as consisting in the making over of a thing 'in return for money', or to lay stress on the giving of money by one party as being the characteristic feature of sale as distinguished from exchange. What does distinguish sale from exchange is rather the fact that in a sale the thing is made over in return for a *sum* of money—it is this that constitutes the essence of what we call the 'price'—and that the obligation of the purchaser consists in the 'payment of money' in the sense only of making over a certain quantum of value.

By this action he claims payment of the price in return for the thing. The purchaser's obligation is an obligatio dandi: he is bound to procure the ownership of a sum of money. If the ownership of the money does not pass by the traditio to the vendor—as would be the case if the money paid did not belong to the purchaser—there is no proper performance on the part of the purchaser, although, if the money becomes mixed with the vendor's money, the effect of the payment (as already explained, supra, p. 304) is to discharge the purchaser. The purchaser's obligation is an obligatio bonae fidei. He is bound, not merely 'certam pecuniam dare', but to do whatever is involved in the requirements of good faith. He must not only pay the price, but he must pay it at the proper time. If he fails in this duty, if, in other words, he is in 'mora solvendi', he is bound to pay interest on account of such mora and, generally, to compensate the vendor for all damage suffered by him in consequence of his (the purchaser's) failure to pay in accordance with the contract.

The purchaser's remedy against the vendor is the actio emti. By this action he claims delivery of the thing in return for the price. The vendor's obligation is an obligatio faciendi: according to Roman law—the rule of the German Civil Code on this subject is different (see § 433 ff.)—he is only bound (in a sale of a material thing) rem *tradere*, and not rem *dare*; that is to say, he is only bound to do that which, if done by the owner, would transfer the ownership of the thing—viz. deliver possession with the intention of transferring ownership (tradere)—but he is not answerable for the actual result of the traditio. Even where the vendor was not the owner of the thing sold, so that his traditio did not, in fact, pass the ownership to the purchaser, he has none the less performed his contract. The purchaser cannot sue him for his failure to procure ownership, because the procuring of ownership (dare), as such, is not part of the vendor's duty. The vendor is, however, not only bound 'rem tradere', but is further bound to do everything that is required by bona fides. Accordingly, he is bound to guarantee the purchaser undisturbed possession of the thing, 'rem habere licere'; that is to say, he is bound, not merely to deliver the thing, but to warrant the purchaser against any defect in his title to the thing, to warrant him, in short, against what is called 'eviction'. If in consequence of the vendor's failure to give his purchaser a title

as owner a third party (the real owner) succeeds, by process of law, in depriving the purchaser of the possession of the thing—and that is what is meant by 'eviction' — the purchaser becomes immediately entitled to sue the vendor by actio emti on the ground of the eviction, and to claim, not indeed a return of the purchase-money as such, but full compensation for his 'interest', i. e. for all damage suffered by him in consequence of the eviction. The same rule applies where, though the vendor is owner, his title is in some way defective, so that a third party—e. g. a pledgee of the thing—is in a position to evict the purchaser, that is, to deprive him of the possession of the thing.[2] It is precisely because the vendor's duty is limited to rem tradere that it becomes necessary to supplement this duty by a duty to warrant the purchaser against eviction (rem habere licere). Modern German law (which is confirmed in this respect by the German Civil Code) went a step further than Roman law and adopted the principle—which Roman law did not acknowledge—that the vendor should in all cases directly warrant his title as owner.[3]

In addition to warranting the purchaser against defects in his title, the vendor was bound to warrant the purchaser against defects in the quality of the thing sold. The rules of Roman law as to

[2] The action for eviction is carried on by the purchaser. It is his business to give the vendor notice of the action (litis denuntiatio), in order that the latter may support him in the litigation. No notice is, however, required where it is plain that such support would be useless. According to the old law, the purchaser was bound to 'vouch' his auctor 'to warranty' in order that the latter might defend the action. Cp. supra, p. 50.

[3] The reason for this is a purely historical one. The only kind of sale known to the old law was the solemn mancipatio. An informal sale—e. g. the sale of a res nec mancipi—was not actionable. If the vendor in an informal sale was to be made liable, it was necessary to resort to a stipulatio. The vendor promised by stipulatio to warrant the purchaser against eviction (rem habere licere), or to pay a specified penalty in the event of eviction, as the case might be. A stipulatio of this kind was known as a 'stipulatio duplae' or 'simplae', according as the vendor undertook to refund double the purchase-money or only the simple amount. When informal sales first became actionable, the claim of the purchaser was that the vendor should rem tradere, and should enter into a stipulatio warranting him against eviction. Afterwards he claimed directly rem tradere and rem habere licere, without the intervention of any stipulatio. As far, however, as Roman law was concerned, the vendor's duty to warrant the purchaser against eviction never passed into a duty to give him a title as owner in any event (whether he was deprived of possession or not), though there are some statements in the authorities which point in the direction of such a change. Cp. Bechmann, *Der Kauf*, vol. i. (1876); Rabel, *Die Haftung des Verkäufers wegen Rechtsmangels*, vol. i. (1902).

warranty of quality were developed in connexion with the rules regulating sales of individually determined things.

Sales are divisible into two kinds according as the contract determines the thing sold individually, or only generically. In the former case we have a sale of a 'species', in the latter a sale of a 'genus'. Where the thing sold is a 'species', a specific thing, the vendor's duty consists in delivering this particular thing. He has performed his contract, if he delivers the particular thing, and the fact that it has defects does not alter the case, because what the purchaser bought was this specific thing, and no other. The existence of a defect does not give the purchaser any right to sue by actio emti, unless indeed the vendor was 'in dolo' (i. e. had fraudulently concealed the defect), or had made definite representations in regard to the thing (dicta et promissa) which prove to be untrue. Where that was the case—where, that is, the vendor was in dolo or the thing sold lacked certain qualities which the vendor expressly represented it as having—there even the civil law allowed the purchaser to bring the actio emti against the vendor notwithstanding the fact that the vendor had performed his contract by delivering the thing sold. For the jus civile required the vendor, not merely rem tradere, but to do all that was demanded by bona fides. The rules of the jus civile on this subject were, however, supplemented by the jus honorarium. In Rome the supervision of the markets and the exercise of market jurisdiction were in the hands of the curule aediles. Like the praetors, the curule aediles were in the habit of issuing edicts dealing with the mode in which they proposed to exercise their jurisdiction. It was to this edict of the aediles that the so-called aedilician actions owed their existence—two special actions which supplemented the civil law remedy of the purchaser (the actio emti) by enabling him to sue the vendor on an *implied* warranty of quality. These two actions were the 'actio redhibitoria', in which the purchaser claimed a rescission of the contract of sale and a return (redhibitio) by each party of what he had received, and the 'actio quanti minoris', in which the purchaser claimed an abatement of the price proportionate to the reduction in value caused by the defect (cp. supra, pp. 268, 270). The actio redhibitoria was barred within six menses utiles from the conclusion of the contract, the actio quanti minoris within an annus utilis. The aedilician actions, with their short periods of limitation, were

founded on the existence of a defect as such; that is, they were available whether the vendor was aware of the defect or not. The only requirements were that the defect must be of a substantial character, must not be known to the purchaser, and must not be obvious at once to any one looking at the thing, in other words, it must be a 'latent' defect. It was, however, only where a specific thing was sold that the purchaser had occasion to resort to the aedilician remedies, because in such a case the vendor had, according to the jus civile, performed all that was due from him under the contract by delivering the specific thing. Where, on the other hand, the things sold are determined by reference to a class, the existence of a defect in the things delivered means that the vendor has not delivered things of the kind he was bound to deliver. A defect in the quality of the things is a defect in the *kind* of things promised. A vendor who fails to deliver things of the stipulated quality has not performed his contract. In such a case, therefore, the purchaser can avail himself of his civil law remedy, the actio emti (which is only barred after thirty years), and thereby sue for *performance* of the contract, whereas in a sale of a specific thing he can only bring an aedilician action on a warranty of quality, the vendor being liable to such an action in spite of performance on his part. It should, however, be mentioned that there is some doubt as to whether this rule was accepted in Roman law.[4] Modern German law deals with the question from a different point of view. According to the German Civil Code (§ 480) a distinction must be drawn between such defects as do not, and such as do, alter the character of the thing—and it is often a question of some nicety to which class a particular defect belongs—the rule being that, where the defect does not alter the character of the thing, the plaintiff is restricted, even where the things sold are generically determined, to an action on the defects—an action which is barred within a short period of limitation.

A further difference between sales of things specifically determined and things generically determined occurs in reference to the rules as to periculum. Where things are sold by reference to a class, the contract itself does not individually determine the things sold. They are not, according to Roman law, individualized till a later stage, at the time, namely, when the vendor delivers them to the purchaser. If prior

[4] Cp. Windscheid Kipp, *Pandekten* (8th ed.), vol. ii. p. 648, note 19.

to the delivery things of the kind which the vendor—the debtor—was bound to deliver are accidentally destroyed, the purchaser is not affected by the loss, because it was not these specific things—these particular 100 sacks of wheat, for example, which the vendor had on his premises and intended to deliver to the purchaser—that the purchaser had bought and that the vendor was bound to deliver. In a sale of a genus, therefore, the vendor, on principle, bears the risk till the moment of delivery, and if the things are destroyed, he is not thereby released from his obligation. Where, on the other hand, the thing sold is a specific thing, it is individually determined prior to delivery. The destruction of the specific thing means, therefore, the destruction of what the vendor was bound to deliver. Accordingly, if the destruction took place in circumstances for which the vendor was not answerable, if, in a word, it was due to 'casus', the vendor is released from his obligation. The rule in such a case is: species perit ei cui debetur (p. 365). The risk is with the purchaser, and it commences from the moment when 'emtio perfecta est', i.e. from the moment when the contract has been unconditionally concluded,[5] and the price and the object of the sale have been definitely ascertained.[6] What is more: according to Roman law, the vendor remained entitled to sue by actio venditi for the purchase money notwithstanding the fact that the accidental destruction of the thing released him from performing his part of the contract. The purchaser, in such a case, had to pay the price even though he received nothing at all, or received the thing bought in a damaged condition. This is the meaning of the rule

[5] Where a sale of a specific thing is concluded subject to a suspensive condition, the risk of accidental deterioration during the pendency of the condition must, according to Roman law, be borne by the purchaser; that is to say, he is bound, on fulfilment of the condition, to pay the full price notwithstanding such deterioration. But the purchaser does not bear the risk of accidental destruction. For if the thing sold is destroyed 'casu' during the pendency of the condition, there is no effective contract of sale at all, and the vendor and purchaser are alike discharged.

[6] Where the price of the thing sold is not ascertained till the thing has been measured or weighed or counted (the parties having fixed the price, not for the thing itself, but according to the measure or weight or number of the thing or things sold), or, again, where the thing sold is not ascertained till it has been measured or weighed or counted from a given quantity of things (the sale, in such a case, being really a sale of a res futura)—in both these cases the sale is not perfect till the measuring or weighing or counting has taken place. Till then, therefore, the purchaser does not bear the risk either of deterioration or destruction, the effect of any such accident being to discharge both parties. Cp. l. 35 §§ 5–7 D. (18, 1).

of Roman law that, wherever the object of a contract of sale is an individually determined thing, the periculum rei is with the purchaser as from the moment when the contract is 'perfect', i.e. as from the moment, generally speaking, when the contract was concluded. On the other hand, if the thing receives an unforeseen increase (if, for example, the mare purchased by me has a foal), or if it undergoes an accidental improvement or rises accidentally in value, the purchaser has the benefit of such events, for 'cujus periculum, ejus et commodum esse debet'. The rules of the German Civil Code (§§ 323, 446, 447) as to the manner in which the risk of accidental loss or deterioration shall be borne in the case of a contract of sale are different from those of Roman law. According to the German rules, whether the object of the sale be a specifically determined thing or a thing determined by reference to a class, the risk does not fall on the purchaser till the moment of delivery. If the thing is accidentally destroyed prior to delivery, both parties are discharged. If it is accidentally deteriorated prior to delivery, but subsequently to the conclusion of the contract, the price is proportionately reduced.

'Laesio enormis' occurs when a thing is sold for less than half its value. A rescript of Diocletian allowed the vendor to rescind the sale, unless the purchaser paid up the additional amount the thing was worth.

Sale, as such, is a contract, i.e. an agreement which results in an obligation, not an agreement which operates as a legal disposition; its effect, in other words, is to create a duty to transfer property, but it does not, of its own force, accomplish the transfer. The contract of sale as such—i.e. the consensus of the parties as to the thing sold and the price to be paid for it—does *not* transfer the ownership: all the contract does is to bind the vendor to do a particular act (rem tradere) which, when done, will transfer the ownership. The purchaser acquires ownership in the thing sold, not by virtue of the sale, but by virtue of the traditio made in pursuance of the sale (supra, p. 312). In addition to the traditio of the thing, Roman law required that the price should be paid or credit given for it (supra, p. 313 *ad fin.*). Ownership passes, not on the conclusion of the contract, but on its fulfilment.

§ 3 I. de empt. et vend. (3, 23): Cum autem emptio et venditio

contracta sit (quod effici diximus simulatque de pretio convenerit, cum sine scriptura res agitur), periculum rei venditae statim ad emptorem pertinet, tametsi adhuc ea res emptori tradita non sit. Itaque, si homo mortuus sit vel aliqua parte corporis laesus fuerit, aut aedes totae aut aliqua ex parte incendio consumptae fuerint, aut fundus vi fluminis totus vel aliqua ex parte ablatus sit, sive etiam inundatione aquae aut arboribus turbine dejectis longe minor aut deterior esse coeperit: emptoris damnum est, cui necesse est, licet rem non fuerit nactus, pretium solvere. Quidquid enim sine dolo et culpa venditoris accidit, in eo venditor securus est. Sed et si post emptionem fundo aliquid per alluvionem accessit, ad emptoris commodum pertinet. Nam et commodum ejus esse debet cujus periculum est.

L. 1 D. de evict. (21, 2) (ULPIAN.): Sive tota res evincatur sive pars, habet regressum emptor in venditorem.

2. Locatio Conductio, or Letting and Hiring.

There are three forms of locatio conductio: locatio conductio rei; locatio conductio operarum; locatio conductio operis.

(1) 'Locatio conductio rei' is a contract whereby one party (locator) agrees, in consideration of a money payment, to let the other party (conductor) have the use, or (in the case of a fruit-bearing thing, e. g. a farm) the use and fruits, of a thing. The letter is bound, in Roman law, to allow the hirer to have the promised use of the thing, and to keep the thing in good order and repair. These duties the hirer can enforce by actio conducti. The hirer, on the other hand, must pay the agreed hire-money and restore the thing when the use comes to an end, and he is also bound to pay compensation for all damage caused by any culpa on his part. These duties the letter can enforce by actio locati.

(2) 'Locatio conductio operarum' is a contract whereby one party agrees, in consideration of a money payment, to supply the other with a certain amount of labour, a certain quantum of working power. Contracts with servants, labourers, assistants, &c., are cases in point. The employer (the hirer) of the labour has the actio conducti; the person who supplies, or 'lets', the labour, has the actio locati. The subject-matter of a locatio conductio operarum must always consist of 'operae illiberales', i. e. of unskilled services which have their price, which are *paid for* by the hire-money agreed upon. The rendering of such services is an act which is reducible to a money value. The services, on the other hand, of a mandatary, a friend, a physician, or a teacher, are not susceptible of a money valuation.

(3) 'Locatio conductio operis' is a contract whereby one party agrees, in consideration of a money payment, to supply the other, not with labour, but with the *result* of labour. Such would be a contract concluded with a common carrier (concerning either persons or goods), a contract to do repairs or alterations, or a contract to manufacture something. In these cases it is not enough to supply a certain *quantum* of labour: a tailor who undertakes to repair a coat does not fulfil his contract by merely devoting a certain number of hours to the job; he must actually produce the promised result. Here the person who promises to find the labour is, at the same time, the master, i. e. he is himself the employer of the labour. He is not bound to obey the orders of the other party and to follow his instructions in regard to the manner of carrying out the work. All he is bound to do is to produce the desired result. Hence the party who promises to find the labour is called in this instance the conductor operis; he has, as it were, hired the job (opus); he employs the labour in lieu of the other who is more properly concerned in the opus. The party who receives the result of the labour is called the locator operis, because he has, as it were, let the opus to the other party. The person who accepts the labour has, accordingly, in this instance the actio locati, and the person who supplies the labour has the actio conducti.[7]

In all these cases the contract of hire is a bonae fidei negotium. Both parties are bound to exercise omnis diligentia and, generally speaking, to do everything that is required by bona fides in accordance with the circumstances of the case. A lessor is thus bound, amongst other things, to allow his lessee, in bad years, a proportionate reduction of his rent (remissio), and, conversely, the lessee, if he subsequently recoups himself by an abundant harvest, is bound to make up the amount which was previously remitted from his rent.

In a sale the price must be paid, on principle, concurrently with

[7] Locare means literally 'to place', 'to put into certain hands,' scil. that which is to be let, be it a thing or labour or a particular job. Conducere means literally to 'bring together' (scil. the necessary working power), and the term seems first to have come into use in connexion with the locatio conductio operarum. Cp. Degenkolb, *Platzrecht und Miete* (1867), p. 133 ff.; Mommsen in the *ZS. d. Sav. St.*, vol. vi. p. 263 ff. Degenkolb (*op. cit.* p. 127 ff.) was the first to point out the important bearing of the public contracts of hire (concluded by the magistrate in the name of the community) on the development of the private law of letting and hiring; Mommsen, who accepts Degenkolb's view (*loc. cit.*), maintains that the starting-point of the rules of emtio venditio is to be found in the same way in public contracts.

the delivery of the thing sold (supra, p. 397); in a contract of hire, on the other hand, the principle is that the money need not be paid till the other party has performed his part. For in a sale bona fides requires that, in case of doubt, both parties shall do what they promised to do simultaneously; whereas in a contract of hire bona fides requires that the party who has agreed to let the use of a thing, or to supply labour or the result of labour, shall first perform his part of the contract. Connected with this rule is the further rule that in a locatio conductio the periculum rei rests with the locator. If the thing agreed to be let is accidentally destroyed before the hirer has had any use of it, or if it accidentally deteriorates in such a way that the promised use becomes impossible, the hirer is released from the payment of the hire-money to the extent to which he has been deprived of the use of the thing.

pr. I. de locat. et conduct. (3, 24): Locatio et conductio proxima est emptioni et venditioni iisdemque juris regulis consistunt. Nam ut emptio et venditio ita contrahitur si de pretio convenerit, sic etiam locatio et conductio ita contrahi intellegitur si merces constituta sit; et competit locatori quidem locati actio, conductori vero conducti.

3. Societas, or Partnership.

Societas is a contract whereby two or more persons bind themselves to the mutual performance of certain acts with a view to a common purpose, as where they bind themselves to carry on a business in common (societas negotiationis), or to keep a particular thing (e. g. a dog) in common (societas unius rei), or to hold their whole property in common (societas bonorum), or to make a journey in common.[8] Societas is a bonae fidei negotium. Both parties are mutually bound to do not merely what they promised to do—to contribute the amounts they promised, to allow one another the promised share in the profits or the use of the partnership property —but they are also bound to do whatever is involved in the requirements of bona fides. Thus, amongst other duties, socii must exercise diligentia, but it need only be the diligentia quam suis rebus adhibere solet (scil. socius). A socius cannot be required to show a higher degree of care in partnership matters than he shows in his

[8] A mere agreement to make a journey in common does not, in itself, constitute a societas. It only becomes a societas if the parties mutually promise one another certain acts with a view to this particular purpose, in other words, if the journey is undertaken at the joint expense.

own affairs. It is a man's own fault if he chooses a careless socius. Bona fides further requires that the contract of societas shall be terminable by notice at any moment, unless indeed a definite time has been agreed upon during which the socii waive their right to give notice of withdrawal. If a socius gives notice without justification (i. e. either contrary to express agreement or contrary to good faith), the societas, it is true, is dissolved by the notice, but the partner giving it is bound to compensate his socii. Every partner has the actio pro socio against the other partners. Cp. supra, p. 202.

pr. I. de soc. (3, 25): Societatem coire solemus aut totorum bonorum, quam Graeci specialiter κοινοπραξίαν appellant, aut unius alicujus negotiationis, veluti mancipiorum emendorum vendendorumque, aut olei, vini, frumenti emendi vendendique.

§ 1 eod.: Et quidem si nihil de partibus lucri et damni nominatim convenerit, aequales scilicet partes et in lucro et in damno spectantur. Quod si expressae fuerint partes, hae servari debent.

4. Mandatum.

Mandatum is a contract whereby one party agrees to execute gratuitously a commission received from the other. It is a bonae fidei negotium, and therefore binds both parties to do all that is required by bona fides. Thus the mandatary must execute his commission and—though he derives no benefit from the contract—he must show omnis diligentia, failing which he is liable to pay damages. On the other hand, the mandator is bound to recoup the mandatary for expenses incurred and, generally speaking, to show omnis diligentia. The rights under the contract accrue primarily and in all cases to the mandator, i. e. to the person who gives the commission. Hence the action by which he sues the mandatary is called the actio mandati directa. The mandatary (i. e. the person who receives the commission) only acquires rights in particular circumstances. The mandatary's action against the mandator is called the actio mandati contraria.

The commission *may* be coupled with a grant of plenary authority, i. e. with a grant of power to act in the name of the mandator; for example, to conclude a juristic act or to conduct a law-suit in the name of the mandator. Where that is the case, the mandatary is authorized, at the same time, to act as the mandator's representative (supra, p. 220 ff.).

From a mandatum—where the object is to place the mandatary under a legal obligation to execute his commission—we must distinguish mere advice (a so-called mandatum tua gratia), which is not intended to create any such obligation, and is therefore neither a mandatum nor even a juristic act at all. A mandatum commissioning a person to do an act contra bonos mores is void, because an obligation to do an immoral act can never be created by legal means, neither by a bonae fidei negotium nor by a stricti juris negotium.

§ 7 I. de mand. (3, 26): Illud mandatum non est obligatorium quod contra bonos mores est, veluti si Titius de furto aut de damno faciendo aut de injuria facienda tibi mandet. Licet enim poenam istius facti nomine praestiteris, non tamen ullam habes adversus Titium actionem.

§ 13 eod.: In summa sciendum est mandatum, nisi gratuitum sit, in aliam formam negotii cadere. Nam, mercede constituta, incipit locatio et conductio esse.

§ 83. *Quasi-Contracts.*

Where the facts of a case merely resemble a contract, but nevertheless produce the same effect as a contract, we have a quasi-contract. The following are examples of quasi-contracts:—

I. Enrichment sine causa and ex injusta causa.

Where, in view of the actual circumstances of the case, the enrichment of A at the expense of B appears inconsistent with the policy of the law, such enrichment is said to be *sine causa*; where the enrichment is directly opposed to the policy of the law, it is said to be an enrichment *ex injusta causa*. The person thus enriched (A) is bound to restore the amount by which he was enriched. The person (B) at whose expense A was enriched can proceed against A by condictio.

a. Cases of enrichment sine causa.

1. Solutio indebiti.

Solutio indebiti means the payment by mistake of money which is not owed. The person thus paying by mistake can sue by condictio indebiti for the recovery of the money.

2. Dare ob causam.

Dare ob causam means the making over of property by one person (A) to another (B) in anticipation of some future event

agreed upon between them, e. g. in anticipation of B's marrying C. Until the contemplated event has occurred, or as soon as its occurrence has become for some reason clearly impossible, there is, in the eye of the law, no sufficient consideration for the enrichment of B. A can therefore compel B by the condictio ob causam datorum, or, as it is also called, the condictio causa data causa non secuta, to restore the amount by which he was enriched. On the same principle a person who has performed his part under an innominate real contract—a contract of exchange (p. 379)—may always, in Roman law, avail himself of this condictio for the purpose of recovering what he gave. In other words, he may choose one of two remedies: he may sue either on the innominate real contract and claim counter-performance by the actio praescriptis verbis, or he may sue on the quasi-contract by condictio causa data causa non secuta (unless indeed counter-performance has actually taken place), and claim restoration of the amount by which the defendant has been enriched. The right of the plaintiff to proceed in the second way is called the 'jus poenitendi'.[1]

3. Cases where 'dare' fails to take effect.

Under this heading we include cases where A makes over property to B, intending thereby to produce a legal result (e.g. to give a loan to B), but failing for some reason to produce the intended result. The reason may be, for instance, that there is no corresponding intention on the part of B, as where B thinks that the money was meant as a gift, or is mistaken as to the identity of A. In such cases A cannot indeed sue B on a contract of loan, but he may proceed by condictio sine causa for the recovery of the amount by which B was enriched.[2] The same principle applies where A, intending to give B a loan, gives B coins which are not his (A's), the effect being that B does not become owner of the coins by traditio, but only by consumption, i.e. by the mixture of

[1] The compilers were perhaps the first to introduce the 'condictio propter poenitentiam' into Roman law. It may have been intended to take the place of the actio fiduciae, which was available for the purpose of compelling a person who had received a thing subject to a trust under a mancipatio (or in jure cessio) fiduciae causa (in other words, under a fiducia cum amico contracta, supra, p. 373[1], not only to carry out the trust, but also to restore the thing. Cp. Gradenwitz, *Interpolationen*, p. 146 ff.; Lenel, *ZS. d. Sav. St.*, vol. ix. p. 182. Karlowa (*Röm. RG.*, vol. ii. pp. 771, 772) takes a different view.

[2] Cp. the so-called condictio Juventiana, supra, p. 376.

the money which is not his (B's) with money of his own (supra, p. 304). And the same condictio sine causa is available, generally speaking, wherever one person receives something that ought to have been received by another. For example: A sells a thing which was bequeathed to B; the thing is destroyed; B cannot therefore proceed by rei vindicatio, but he can sue A (the vendor) by the condictio sine causa for the amount realized by the sale. The object, then, of the condictio sine causa is, broadly speaking, to rescind any transaction whereby a person is erroneously enriched, provided always that the equitable claim of the plaintiff is not counteracted by an equitable defence on the part of the defendant.

b. Cases of enrichment ex injusta causa.

1. Theft.

The possession of stolen property enriches the thief at the expense of the owner in a manner contrary to law.[3] The owner can compel the thief by a condictio known as the condictio furtiva—the name however does not occur before Justinian—to restore the property or to pay him damages.

2. Dare ob turpem causam.

Dare ob turpem causam means the making over of property in circumstances which render its acceptance immoral. The payment of ransom extorted by brigands would be a case in point. The person giving the property can sue by the condictio ob turpem causam for its recovery, even where the event in contemplation of which the property was given—the release of the prisoner in the case supposed—has actually taken place, subject however to the condition that the *giving* of the property was not also immoral: a man who hired an assassin, for example, could not sue by condictio ob turpem causam for the recovery of the hire-money.

3. Dare ex injusta causa.

Dare ex injusta causa means the paying of a debt which is disapproved by the law, e.g. the paying of interest at a usurious rate. And the term is applied, in a general way, to all cases where one person is enriched at the expense of another in a manner which

[3] Roman law even assumed that the thief was enriched by acquiring *ownership* in the stolen property. Hence the condictio furtiva called upon him 'rem *dare*', i. e. to make the plaintiff owner again, notwithstanding the fact that in spite of the theft the plaintiff had of course never ceased to be owner of the property. For an historical explanation of this rule v. Jhering, in his *Jahrbücher f. Dogmatik*, vol. xxiii. p. 205, note.

the law regards as unjust, as where a malae fidei possessor is enriched, at the expense of the owner, by the fruits he has consumed. In all such cases the person enriched is compellable by the condictio ex injusta causa to restore the amount by which he has been enriched.

L. 1 § 1 D. de condictione indebiti (12, 6) (ULPIAN.): Et quidem si quis indebitum ignorans solvit, per hanc actionem condicere potest: sed si sciens se non debere solvit, cessat repetitio.

L. 7 § 1 D. de condictione causa data causa non secuta (12, 4) (JULIAN.): Fundus dotis nomine traditus, si nuptiae insecutae non fuerint, condictione repeti potest: fructus quoque condici poterunt.

L. 1 § 2 D. de condictione ob turpem vel injustam causam (12, 5) (PAULUS): Quod si turpis causa accipientis fuerit, etiam si res secuta sit, repeti potest. L. 2 eod. (ULPIAN.): Utputa dedi tibi ne sacrilegium facias, ne furtum, ne hominem occidas.

II. Receptum nautarum, cauponum, stabulariorum.

A shipowner, innkeeper, or stablekeeper, who takes charge of property belonging to a traveller, is answerable for such property in like manner as though he had concluded an express contract to that effect. This liability was first introduced by the praetor. If the property in question is lost or injured, the traveller can sue for full damages by the actio de recepto, unless, indeed, the defendant (the shipowner, &c.) can prove that the loss was caused by the traveller's own negligence or by an unavoidable accident (vis major).

L. 1 pr. D. nautae caup. (4, 9): Ait praetor: NAUTAE, CAUPONES, STABULARII, QUOD CUJUSQUE SALVUM FORE RECEPERINT, NISI RESTITUENT, IN EOS JUDICIUM DABO.

III. Negotiorum gestio.

Negotiorum gestio occurs where one person, *without* previous authority, manages another person's affairs; as, for example, where he conducts a lawsuit for a friend who is absent, or takes charge of the friend's property, or pays his debts. Such acts give rise to a relationship similar to mandatum. Under this relationship a right accrues in the first instance, and in all cases, to the person whose affairs are being managed (the principal, the dominus negotii)—the right, namely, to require the negotiorum gestor to exercise omnis diligentia in the conduct of the matter he has undertaken. To

enforce this right the dominus negotii has the actio negotiorum gestorum directa. It is only in certain circumstances that the negotiorum gestor acquires a right as against the dominus negotii, a right e.g. to be indemnified for expenses incurred 'utiliter', i.e. for expenses which were intended to benefit, and did in fact benefit, the dominus.[4] To enforce any such right the negotiorum gestor has the actio negotiorum gestorum contraria.

§ 1 I. de obl. quasi ex contr. (3, 27): Igitur cum quis absentis negotia gesserit, ultro citroque inter eos nascuntur actiones quae appellantur negotiorum gestorum; sed domino quidem rei gestae adversus eum qui gessit directa competit actio, negotiorum autem gestori contraria. Quas ex nullo contractu proprie nasci manifestum est; quippe ita nascuntur istae actiones, si sine mandato quisque alienis negotiis gerendis se optulerit: ex qua causa ii quorum negotia gesta fuerint etiam ignorantes obligantur. Idque utilitatis causa receptum est, ne absentium, qui subita festinatione coacti, nulli demandata negotiorum suorum administratione, peregre profecti essent, desererentur negotia, quae sane nemo curaturus esset, si de eo quod quis impendisset nullam habiturus esset actionem.

IV. Tutela.

As soon as a guardian enters upon his duties, there arises between him and his ward a relationship similar to mandatum. This relationship confers in every case a right on the ward, the right namely to require his guardian to show care in the management of the guardianship. But since the acceptance of the guardianship is compulsory, the guardian is only liable for failure to show the diligentia quam suis rebus adhibere solet. The ward's remedy against his guardian is the actio tutelae directa. It is only in certain circumstances that the guardian acquires a right as against his ward, e.g. when he has incurred any outlay. The guardian sues his ward by the actio tutelae contraria.

[4] A mandatary could claim to be indemnified for such expenses as, having regard to the degree of care required of him (the care of a prudent man of business), he might fairly think necessary for the due performance of his duty. A negotiorum gestor, on the other hand, can only claim to be indemnified for expenses incurred 'utiliter', i.e. for expenses which were, both subjectively (in reference to the interests of the dominus) and objectively, appropriate to the matter in hand. It is enough if 'negotium utiliter *coeptum* est', i.e. if the expenses incurred are appropriate to the particular business. It is not necessary that they should have actually achieved the desired object. Thus if the negotiorum gestor buys medicine for a sick slave of the dominus, he is entitled to be indemnified whether the slave recover or not.

§ 2 I. eod.: Tutores quoque, qui tutelae judicio tenentur, non proprie ex contractu obligati intelleguntur (nullum enim negotium inter tutorem et pupillum contrahitur); sed quia sane non ex maleficio tenentur, quasi ex contractu teneri videntur.

V. Communio.

Communio, or community of property, gives rise, as between the co-proprietors, to a relationship similar to societas. The rights and duties of the parties inter se are as follows: (1) Each party can claim a partition from the other. If the thing is divisible, it is physically divided; if it is indivisible, one party is awarded the whole, subject to an obligation to compensate the other. (2) Each party can claim to be indemnified for expenses necessarily incurred on behalf of the other. (3) Each party is bound to show the diligentia quam suis rebus, i. e. is bound to treat the common property with the same care as he would treat his own, failing which he is liable for damages. There are three kinds of communio, according as the parties have the same property, the same inheritance, or the same boundaries in common. 'Community of boundaries' occurs where the true boundaries are no longer ascertainable. Corresponding to these three kinds of communio there are three partition suits, or 'judicia divisoria'. Where common property is to be divided, the actio communi dividundo applies; where a common inheritance is to be divided, the actio familiae erciscundae; where common boundaries are concerned, the actio finium regundorum. By means of a judicium divisorium the plaintiff can assert not only his right to a partition, but also his right to 'praestationes personales', i.e. his right to indemnification for expenses and to compensation for damage. So far, however, as a partition suit aims at a division, it belongs to the so-called judicia duplicia (supra, p. 334): both parties sustain the same *rôle* in the suit, and the adjudicatio (supra, p. 315), or condemnatio (as the case may be), binds both parties to do whatever is necessary for the purpose of effecting the partition.

§ 3 I. eod.: Item si inter aliquos communis sit res sine societate, veluti quod pariter eis legata donatave esset, et alter eorum alteri ideo teneatur communi dividundo judicio quod solus fructus ex ea re perceperit aut quod socius ejus in eam rem necessarias impensas fecerit: non intellegitur proprie ex contractu obligatus esse, quippe nihil inter se contraxerunt; sed quia non ex maleficio tenetur, quasi ex contractu teneri videtur.

VI. The heir, by entering on his inheritance, incurs a quasi-contractual obligation to pay over to the legatees all such legacies as he has been validly charged with by the testator. Cp. § 115.

§ 84. *Pacts.*

A pactum, or pact, is an informal declaration of consensus. An informal release, or an informal compromise, would be an example of a pact. An obligatory pact is an informal obligatory declaration of consensus which the Roman civil law refused to acknowledge as a contract. The principle applied to pacts of this kind—so-called nuda pacta—was that they gave rise, not to an actionable obligation, but only to what was called a 'naturalis obligatio', i.e. to an obligation which, though not enforceable by action, could nevertheless be validly discharged by payment. In other words, if the debtor, of his own accord, fulfilled his informal promise, well and good; he could not recover the money he had paid by condictio indebiti (supra, p. 408). On the other hand, he could not be *compelled* by actio to pay. The only way in which effect could be given to a pact was by means of an exceptio, in cases, namely, where one of the parties, being the defendant in an action, was in a position to plead the pact by way of defence.[1]

Nevertheless there were certain pacts—called 'pacta vestita'—which were enforceable by action. Of these some were actionable even according to the classical civil law; others were actionable by the praetorian law; and a third class by the later civil law (the imperial law).

I. According to the classical civil law, and consistently with the general ideas inherent in that law, the so-called pacta adjecta were actionable. Pacta adjecta were collateral agreements 'added' there and then (ex continenti) to a bonae fidei negotium at the moment when the latter was concluded. Thus, if the parties to a contract of sale agreed that, in default of punctual performance, the defaulting party should pay a specified penalty, this penalty

[1] It should be noticed that the non-observance of the requirements of a formal contract does not in itself convert the transaction into a valid pact. If the parties intended to conclude a formal contract, but failed to satisfy the necessary requirements of form, the result is, in case of doubt, not an informal agreement (which the parties never contemplated), but no agreement at all; cp. l. 1 § 2 D. de verb. obl. (45, 1). It is a mistake to take this passage as proving that a nudum pactum did not give rise to a natural obligation.

was recoverable by the action on the *sale*. A stipulatio was not needed. Every bonae fidei negotium bound the parties to do all that was required by bona fides. The good faith, therefore, on which the principal agreement was based, necessarily implied a duty to perform whatever was promised in the collateral agreement which was simultaneously concluded. If, however, the collateral agreement was concluded subsequently to the principal agreement, it could not be enforced by the action on the principal agreement (of which, in such a case, it did not form an integral part), and not being actionable for its own sake, it gave rise, not to an actio, but only to an exceptio. The following two kinds of agreements are particular cases of pacta adjecta:

1. Agreements in favour of a third party.

An 'agreement in favour of a third party' is an agreement providing that some third person shall be entitled to the benefit of the rights created by the agreement. Thus the parties to a depositum may agree that a third party shall be entitled to claim re-delivery of the thing deposited. According to Roman law an agreement of this kind was originally void, the older Roman law adhering to the principle that a contract can only confer rights and impose liabilities on the parties themselves (cp. supra, p. 221). The classical law, however, came to recognize the feasibility of conferring a benefit *mortis causâ* on a third party by means of a pactum adjectum of this kind; that is to say, if the third party survived the promisee, the classical law allowed him to sue the debtor on the contract in the same way as if the claim had been bequeathed to him. Such a transaction is known as a 'fideicommissum a debitore relictum'. The law of the later Empire recognized the validity of pacta adjecta of this kind in some further cases.[2] At no time, however, did agreements in favour of a third party secure a general recognition in Roman law. It was only in the modern law of Germany that they obtained such general recognition (see German Civil Code, § 328 ff.).

2. Agreements conferring a right of withdrawal.

As examples of such agreements we may take 'in diem addictio'

[2] Hellwig, in his recent treatise *Die Verträge auf Leistung an Dritte* (1899), p. 1 ff., was the first to give a satisfactory account of the development of the Roman law on this subject, and more particularly of the legal nature of the fideicommissum a debitore relictum.

and the 'lex commissoria'. 'In diem addictio' is an agreement giving one party to a contract a right to withdraw if better terms are offered to him by a third party within a specified time. 'Lex commissoria' is an agreement entitling one party to a contract to withdraw if the other party does not perform his obligation in time.[3] The withdrawal has the same effect on the contract as a resolutive condition. Each party is bound to return whatever he may have received.

II. Among pacts actionable by the praetorian law (pacta praetoria) the 'constitutum debiti' was the most important. A constitutum debiti was a promise to discharge a subsisting liability, either one's own (constitutum debiti proprii) or another's (constitutum debiti alieni). Such a promise, if given in the form of a stipulatio, was actionable by the civil law. The praetor, however, made it actionable, even when unaccompanied by any formalities, by granting the promisee the actio de pecunia constituta, an action which (as the name implies) was originally only available in the case of a constitutum for a *money* debt, and only in respect of pecunia credita (the term 'constitutum' signifying, in the old times, the informal fixing of a day for the repayment of money which was owed). A person might thus promise by constitutum to discharge the liability of another, and, if he did so, the obligation he incurred was more stringent than that of a surety. For whereas a fidejussor was released by anything that extinguished the principal debt, a constituens was only released by payment to, or material satisfaction of, the creditor. The constituens and the principal debtor were not (like the fidejussor and his principal) correal debtors, but were merely solidary debtors (supra, pp. 361, 362).

III. According to the later imperial law promises of a gift and promises to give a dos (infra, § 95) were actionable in the shape of mere informal pacts (pacta legitima). But in the absence of a judicial insinuatio a promise of a gift was only binding to the extent of 500 solidi (supra, p. 212).

[3] There is a lex commissoria in the law of things as well as in the law of obligations. The lex commissoria of the law of things—which was an agreement that, in the event of the debtor (the pledgor) making default, his ownership in the thing pledged should be forfeited—was void under the law of the later Empire (supra, p. 356). The lex commissoria mentioned in the text—giving one party to a contract a right to withdraw—belongs to the law of obligations, its intention being that, in the event of the debtor making default, his rights under the contract shall be forfeited.

L. 7 § 7 D. de pact. (2, 14): Ait praetor: PACTA CONVENTA QUAE NEQUE DOLO MALO NEQUE ADVERSUS LEGES, PLEBISCITA, SENATUSCONSULTA, EDICTA, DECRETA PRINCIPUM, NEQUE QUO FRAUS CUI EORUM FIAT, FACTA ERUNT, SERVABO.

L. 13 C. de pact. (2, 3) (MAXIMINUS): In bonae fidei contractibus ita demum ex pacto actio competit, si ex continenti fiat. Nam quod postea placuit, id non petitionem, sed exceptionem parit.

§ 9 I. de act. (4, 6): De pecunia autem constituta cum omnibus agetur quicumque vel pro se vel pro alio soluturos se constituerint, nulla scilicet stipulatione interposita; nam alioquin, si stipulanti promiserint, jure civili tenentur.

B. DELICTUAL OBLIGATIONS.

§ 85. *The Private Delicts of Roman Law.*

In Roman law there are a number of delicts against which provision is made by remedies belonging to private law. These are the so-called private delicts. A private delict gives rise to an obligation: the law intends that the delinquent shall be punished by becoming liable to a personal action at the suit of the injured party, the object of such action being either to recover damages (in which case it is an actio rei persequendae causa comparata, supra, p. 266) or to recover a penalty (in which case it is an actio poenalis) or to recover both damages and a penalty (in which case it is an actio mixta). The private delicts of Roman law are as follows:—

1. Furtum.

Furtum is the secret and wilfully wrongful appropriation of a movable thing not one's own, whether such appropriation is coupled with an actual removal of the thing from the custody of another or not.[1] Theft gives rise to two actions. First, the actio furti, which is penal—the penalty being quadruplum in the case of a fur manifestus (i. e. of a thief caught in the act, though it is enough if he is seen in the commission of it), and duplum in the case of a fur nec manifestus. Secondly, the condictio furtiva, which is reparatory

[1] According to the civil law the conception of furtum covered rapina. It was only the praetorian law that distinguished rapina from furtum, rapina consisting in a violent, furtum in a secret, misappropriation of a thing. It will be observed that the civil law definition of furtum was wide enough to cover, not only what in modern criminal law is known as larceny (including robbery), but also kindred offences, such as embezzlement.—As to the historical development of the Roman law of furtum, cp. Mommsen, *Röm. Strafrecht* (in Binding's *Handbuch*), 1899, p. 733 ff.; Pernice, *ZS. d. Sav. St.*, vol. xvii. p. 216 ff.; H. F. Hitzig, *ibid.*, vol. xxiii. p. 315 ff.

(supra, p. 417). The actio furti can be brought by any person injured by the theft (cujus interest rem non subripi, rem salvam esse). On the other hand, the condictio furtiva to recover damages for a stolen thing can only be brought by the owner of the thing.

In the earlier Roman law there was also an 'actio furti concepti' against persons on whose premises stolen property was discovered after a search; an 'actio furti oblati' against persons who concealed stolen property on the premises of another; an 'actio furti prohibiti' against persons who resisted a search; an 'actio furti non exhibiti' against persons who refused to give up stolen property found after a search on their premises. All these actions were associated with the ancient right of a person whose property had been stolen to enter any house for the purpose of conducting a formal search with certain prescribed ceremonies. When this right of private search fell into disuse, the different actions associated with it also ceased to be employed.

The definition given above is only applicable to a theft of the thing itself (furtum rei ipsius). In Roman law there is also a 'furtum possessionis', which occurs when the owner of a thing abstracts the thing from a person entitled to the possession of it (e.g. from a pledgee); and further a 'furtum usus', which occurs when a person appropriates a thing for mere temporary use. The same remedies apply as in the case of a furtum rei ipsius, viz. the condictio furtiva, in which the plaintiff claims the possession or the usus, and the actio furti, in which he claims the double or fourfold value of his interest in the possession or usus by way of penalty.

L. 1 § 3 D. de furtis (47, 2) (PAULUS): Furtum est contrectatio rei fraudulosa lucri faciendi gratia vel ipsius rei vel etiam usus ejus possessionisve.

§ 3 I. de obligat. ex del. (4, 1): Furtorum autem genera duo sunt, manifestum et nec manifestum.—Manifestus fur est, quem Graeci ἐπ' αὐτοφώρῳ appellant, nec solum is qui in ipso furto deprehenditur, sed etiam is qui eo loco deprehenditur quo fit . . . Immo ulterius furtum manifestum extendendum est, quamdiu eam rem fur tenens visus vel deprehensus fuerit, sive in publico sive in privato, vel a domino vel ab alio, antequam eo perveniret quo perferre ac deponere rem destinasset. Sed si pertulit quo destinavit, tametsi deprehendatur cum re furtiva, non est manifestus fur. Nec manifestum furtum quid sit ex his quae diximus intellegitur. Nam quod manifestum non est, id scilicet nec manifestum est.

§ 13 eod.: Furti autem actio ei competit cujus interest rem

salvam esse, licet dominus non sit; itaque nec domino aliter competit quam si ejus intersit rem non perire.

§ 19 eod.: Furti actio, sive dupli, sive quadrupli, tantum ad poenae persecutionem pertinet. Nam ipsius rei persecutionem extrinsecus habet dominus, quam aut vindicando aut condicendo potest auferre. Sed vindicatio quidem adversus possessorem est, sive fur ipse possidet sive alius quilibet; condictio autem adversus ipsum furem heredemve ejus, licet non possideat, competit.

2. Rapina.

Rapina is the taking away of a thing by violent means. It gives rise to the praetorian actio vi bonorum raptorum, in which the plaintiff claims quadruplum, a simplum being counted as damages. The actio vi bonorum raptorum is thus an actio mixta. After the lapse of an annus utilis (supra, p. 283) the plaintiff can only recover simple damages. The action is open to any one injured by the robbery.[2]

pr. I. de vi bon. rapt. (4, 2): Qui res alienas rapit, tenetur quidem etiam furti. Quis enim magis alienam rem invito domino contrectat quam qui vi rapit? Ideoque recte dictum est eum improbum furem esse. Sed tamen propriam actionem ejus delicti nomine praetor introduxit quae appellatur vi bonorum raptorum, et est intra annum quadrupli, post annum simpli. Quae actio utilis est, etiamsi quis unam rem licet minimam rapuerit. Quadruplum autem non totum poena est et extra poenam rei persecutio, sicut in actione furti manifesti dicimus, sed in quadruplo inest et rei persecutio, ut poena tripli sit, sive comprehendatur raptor in ipso delicto sive non.

3. Damnum injuria datum.

Damnum injuria datum means wilful or negligent damage to corporeal property. The owner whose property is damaged can claim full compensation by the actio legis Aquiliae. When the damage consists in the killing of a slave, or the killing of any quadruped included under the name of cattle (quadrupedes quae pecudum numero sunt et gregatim habentur, veluti oves, caprae, boves, equi, asini, muli;—canis inter pecudes non est, l. 2 § 2 D. 9, 2), the defendant must pay the highest value of such slave or quadruped within the year immediately preceding;[3] when the

[2] According to the Roman civil law the conception of rapina was covered by the conception of furtum, and the rules as to furtum applied equally to rapina; cp. note 1, supra.

[3] This is provided by the first chapter of the lex Aquilia.

damage consists in any other injury to a corporeal thing, he must pay the highest value of such thing within the month immediately preceding.[4] The plaintiff is entitled, as a matter of right, to have the compensation due to him calculated on this principle, quite irrespective of the amount of damage actually suffered by him. Thus the actio legis Aquiliae is an actio rei persequendae causa, but the peculiar manner in which the damages are assessed imports a penal element into it. The same may be said of the rule that, if the defendant in the actio legis Aquiliae (i.e. the perpetrator of the damage) denies his liability and judgement goes against him, he must pay double damages: lis infitiando crescit in duplum.

The actio legis Aquiliae does not apply, unless the damage is imputable to the defendant, whether he be guilty of dolus or merely of culpa levis. In order, however, to give rise to the delict contemplated by the lex, there must be culpa levis *in faciendo* on the part of the defendant. Non facere, as such, is not a delict—though there are circumstances in which a mere forbearance (non facere) may be equivalent to an act (facere), in which case the *act* may be a delict. It is a further requirement that the wrongful act of the defendant shall have resulted in damage to a definite corporeal thing belonging to the plaintiff. The actio legis Aquiliae is not available on the ground of a mere injury to property in the wider sense of the term, viz. in the sense of an aggregate of proprietary rights and liabilities (infra, under 5). The words of the lex Aquilia required that the damage to the thing should be caused *directly* by the act of the defendant (damnum corpore corpori datum).[5] Sub-

[4] The third chapter of the lex Aquilia dealt with 'ceterae res' and mere *injuries* to slaves and cattle. The second chapter was concerned with adstipulatores (supra, p. 389) who abused the formal rights they had acquired in order to release a debtor by acceptilatio (infra, p. 435). This chapter of the lex Aquilia fell into disuse, because the recognition by the civil law of the binding character of mandatum (supra, p. 407) enabled the injured party to sue the fraudulent adstipulator by the actio mandati directa for full damages, the delictual action on the lex Aquilia thus becoming superfluous.—The Twelve Tables only contained a provision with regard to damage to property by *rumpere* (rupitiae), and imposed on the delinquent the duty either to repair (sarcire) the thing broken, or else to compensate the plaintiff by another thing of equal value.

[5] In chapter i. of the lex Aquilia (servus, pecudes) the words used were 'injuria occidere', in chapter iii. (ceterae res praeter hominem et pecudem occisos) the words were 'injuria urere, frangere, rumpere'; in either case the statute referred to damage to property caused by direct physical contact. See Mommsen, *op. cit.* (note 1), pp. 827, 828.

sequently, however, the praetor extended the actio legis Aquiliae, in the shape of an actio utilis (supra, p. 259), to cases where the damage to the thing was merely the indirect result of the act of the defendant. For example: A cuts the cable by which B's ship is moored so that the ship drifts out to sea and is lost; the actio legis Aquiliae directa would only enable the plaintiff to recover the value of the cable; the actio legis Aquiliae utilis, however, entitles him to damages for the loss of the ship. In certain cases the praetor even granted an actio in factum modelled on the lex Aquilia (accommodata legi Aquiliae), in cases namely where there was not, properly speaking, any damage to the thing, but where the plaintiff was just as effectually deprived of it as if it had been actually destroyed. For example: A takes the chains off B's slave and the slave escapes; or A throws B's ring into the sea. And finally, when leave was given to a freeman who had suffered a bodily injury to use the actio legis Aquiliae for the purpose of recovering compensation for his medical expenses and loss of earnings, the statute was thereby in effect extended from cases of damage to corporeal property to a case of damage to property in the wider sense of the term.[6] Nevertheless it remained the rule that, as a matter of principle, the actio legis Aquiliae should be confined to cases of damage to corporeal property.

pr. I. de leg. Aq. (4, 3): Damni injuriae actio constituitur per legem Aquiliam. Cujus primo capite cautum est ut, si quis hominem alienum alienamve quadrupedem quae pecudum numero sit injuria occiderit, quanti ea res in eo anno plurimi fuit, tantum domino dare damnetur.

§ 2 eod.: Injuria autem occidere intellegitur qui nullo jure occidit. Itaque qui latronem occidit, non tenetur, utique si aliter periculum effugere non potest. § 3: Ac ne is quidem hac lege tenetur qui casu occidit, si modo culpa ejus nulla invenitur. Nam alioquin non minus ex dolo quam ex culpa quisque hac lege tenetur.

§ 12–14 eod.: Caput secundum legis Aquiliae in usu non est. Capite tertio de omni cetero damno cavetur.—Hoc tamen capite non quanti in eo anno, sed quanti in diebus triginta proximis res fuerit obligatur is qui damnum dederit.

§ 16 eod.: Ceterum placuit ita demum ex hac lege actionem esse, si quis praecipue corpore suo damnum dederit. Ideoque in eum qui alio modo damnum dederit utiles actiones dari solent, veluti si quis hominem alienum aut pecus ita incluserit ut fame necaretur. . . Sed

[6] Mommsen, *op. cit.*, p. 836.

si non corpore damnum fuerit datum, neque corpus laesum fuerit, sed alio modo damnum alicui contigit, cum non sufficit neque directa neque utilis Aquilia, placuit eum qui obnoxius fuerit in factum actione teneri; veluti si quis, misericordia ductus, alienum servum compeditum solverit ut fugeret.

4. Injuria.

Injuria, or insult, means any wilful disregard of another's personality. The law of the Twelve Tables as to injuriae was somewhat narrowly circumscribed, an action only being granted in the case of certain bodily injuries (membrum ruptum, verberare, pulsare). A lex Cornelia (passed by Sulla in 81 B.C.) added the case of forcible entry into another's house (domum vi introire), and provided, at the same time, that all civil law injuriae should be tried in accordance with a definite form of procedure (corresponding to the procedure in criminal cases), that is to say, before a court of jurors presided over by a magistrate. It was the praetor who laid down the lines on which the subsequent development of the law of injuriae proceeded. Not limiting the conception of injuria to bodily injuries, he granted a private action—called the 'actio injuriarum aestimatoria'—in all cases of insult alike. By this action, which had to be brought intra annum utilem, the plaintiff could claim the payment of a fine proportionate to the insult he had received, the amount claimed by him being, however, liable to reduction at the hands of the judex. In the cases provided for by the jus civile the praetor was bound to grant the actio injuriarum; in all other cases it was within his discretion whether he would grant it or not.[7] This was the foundation upon which the law of injuriae as subsequently developed by the Roman jurists was based. Any wilful disregard of another's personality might be held to be covered by the conception of injuria, the result being that the actio injuriarum, supplementing the remaining legal remedies, came to be available in all cases where the defendant could be charged

[7] Cp. on the above topic, Mommsen, *op. cit.*, p. 784 ff. The law of the Twelve Tables gave the injured party a private action in which he could claim, either a fixed sum of money (mostly 25 asses, or about five shillings), or, if the injury was 'membrum ruptum', talio, which latter claim, however, almost invariably resulted in a pecuniary composition. 'Carmen famosum,' or the public singing of ribald songs, was treated as a breach of public order, and was accordingly punished as a crime, the penalty being death.—The praetorian actio injuriarum aestimatoria seems to have been modelled on the Greek law as to injuriae; v. H. F. Hitzig, *Injuria* (1899), p. 71.

with an intentional violation of another person's right, i.e. with a violation deliberately designed to injure the personality of another. What had at first been the remedy for an unjust attack on the honour of another, thus gradually became a general remedy for any vexatious violation of another person's rights.[8]

The actio injuriarum is a so-called actio vindictam spirans, i.e. its object is to give the plaintiff personal satisfaction. Hence it is not actively transmissible; the right of action is confined to the outraged person himself and does not pass to his heirs till after litis contestatio has taken place. Since its effect is moreover to impose a penalty, it is an actio poenalis and, as such, also passively untransmissible.

§ 1 I. de injur. (4, 4): Injuria autem committitur non solum cum quis pugno puta aut fustibus caesus vel etiam verberatus erit, sed etiam si cui convicium factum fuerit, sive cujus bona quasi debitoris possessa fuerint ab eo qui intellegebat nihil eum sibi debere, vel si quis ad infamiam alicujus libellum aut carmen scripserit, composuerit, ediderit, dolove malo fecerit quo quid eorum fieret, sive quis matremfamilias aut praetextatum praetextatamve adsectatus fuerit, sive cujus pudicitia attentata esse dicetur; et denique aliis pluribus modis admitti injuriam manifestum est.

5. Dolus and Metus.

Dolus (i.e. any wilful act whereby damage is done to the property of another, the term property being understood in its widest sense) and metus (i.e. any threat by which damage is done to the property of another) render the delinquent liable to pay full compensation, the appropriate remedies being the actio de dolo (supra, p. 210) and the actio quod metus causa (supra, p. 209) respectively. Inasmuch, however, as the actio de dolo subjects the party condemned to infamy, it is only granted in a subsidiary way, when no other remedies are available (si qua alia actio non erit); and after the lapse of two years, according to Justinian's law—post annum utilem, according to the praetorian law—it can only be brought in the shape of an actio in factum for the purpose of making the defendant refund any profit he may still retain as a result of his dolus.[9] A threat which

[8] See, on this subject, Jhering in his *Jahrbücher für Dogmatik*, vol. xxiii. p. 155 ff.: *Rechtsschutz gegen injuriöse Rechtsverletzungen.*—Landsberg, *Injuria und Beleidigung* (1886).

[9] As to the history of the actio doli see Mommsen, *Röm. Strafrecht*, pp. 679, 680.

causes proprietary damage to another being really only a special case of dolus, it follows that, generally speaking, in cases of dolus any damage to property is sufficient to give rise to an action for compensation, whereas in cases of mere culpa (i.e. in cases of damage for which, though it is unintentional, the defendant is nevertheless answerable) the principle of Roman law is that no action ex delicto arises, unless the damage is done to a corporeal thing (supra, under 3). The German Civil Code has gone far beyond the somewhat narrow point of view thus adopted by Roman law. By § 823 ff. of the Code it is provided that negligent damage shall, on principle, give rise to precisely the same liability to pay compensation as wilful damage.

§ 86. *Quasi-Delicts.*

Where the facts of a case merely resemble a delict, but nevertheless produce the same effect as a delict (viz. an obligation to pay damages or a penalty), we have a quasi-delict.

1. Judex qui litem suam facit, i.e. a judge (in the formulary procedure, the sworn judex) by whose act or default in deciding or conducting a lawsuit a party to such suit is injured, is liable to an action for damages, the amount of which is left to the discretion of the judge who tries the case: quantum aequum judici videbitur. Such an action is regarded as *quasi*-delictual, because it is available, not only in cases of deliberately unfair decisions, but also in cases of less serious errors due to what was called the 'imprudentia judicis', such errors, for example, as overlooking the day fixed for a trial, disregarding the rules of law concerning adjournment, and so forth. It would, however, be quite wrong to suppose that the action in question could be brought on the ground that the judgement was unjust in substance.[1]

2. Where something is thrown or poured out of a room to the injury of another, the praetorian actio de effusis vel dejectis is available against the occupier, or occupiers, of the room. In this action the plaintiff claims double damages; the action therefore belongs to the class known as 'actiones mixtae'.

3. A person who places or hangs something over a public way to the common danger of all, is liable to the praetorian actio de posito

[1] Cp. Lenel, *Edictum*, pp. 136, 137.

vel suspenso. The plaintiff in this action, which is an actio popularis (granted cuivis ex populo, supra, p. 266), claims a private penalty of 10,000 sesterces, for which Justinian substituted 10 gold solidi.

4. Shipowners (nautae), innkeepers (caupones), and stable-keepers (stabularii) are answerable by the praetorian law for delicts committed by their servants while acting within the scope of their employment. The injured party has an actio in factum for the recovery of double damages, i.e. an actio mixta.

5. The delict of a slave (unlike his contract, § 88 I) renders the master liable to a noxal action. That is to say, the action to which the delict of the slave gives rise may be brought against the master in the shape of a noxal action. The master has the alternative of either taking the consequences of the delict upon himself or of surrendering the slave to the injured party (noxae dare). Cp. supra, p. 274, note 7. The same rule applies when an animal causes damage 'contra naturam', i.e. in a manner contrary to its natural disposition. The owner is liable to a noxal action in the shape of the so-called actio de pauperie. Under the law prior to Justinian a noxal action could also be brought against a paterfamilias in respect of delicts committed by the filiusfamilias.

III. Transfer and Extinction of Obligations.

§ 87. *Transfer of Obligations.*

According to the Roman civil law, the creditor in an obligation cannot transfer ('assign') his right to another. True, he may, by a 'mandatum actionis', constitute the other his procurator, or 'processual agent', for purposes of the action, i.e. he may commission the other to sue as his agent for the amount due under the obligation, and may further agree, by what is called a 'mandatum in rem suam', to let him (the agent) retain the sum recovered in the action. But even a processual agent, acting on a mandatum actionis in his own favour (in rem suam), cannot sue in his own right, but can only sue as the representative of another, viz. of the principal from whom he derives his commission. In theory, the agent is not *entitled* to sue for the debt, but, like any other mandatarius, is merely *bound* to sue for it. If the creditor revokes his commission, or if he dies, the mandatum in rem suam is extinguished like any other mandatum. The mandatarius in rem suam has no right in

respect of the debt he sues for. In the eye of the law he is not the creditor, but only the creditor's agent. His relation to the debt does not become defined until he has joined issue with the debtor, i.e. until litis contestatio has taken place. Wherever a procurator is a party to an action, the formula (by means of which, as we have seen above, p. 226, note 2, the litis contestatio was accomplished in the classical procedure) is framed in his favour or against him, according as he (the procurator) represents the plaintiff or the defendant in the action. Thus in an action brought in pursuance of a mandatum actionis the condemnatio is framed in favour of the procurator, while the intentio gives the name of the creditor whom the procurator represents. 'If the defendant owes the mandator (the creditor) 100 aurei, he shall be condemned to pay 100 aurei to the *procurator*.' The result is to constitute the procurator 'dominus litis', i.e. he becomes a party to the action, the effects of which accordingly operate in his favour (or against him, if he represents the defendant). By the wording of the formula, the judex is directed to condemn the debtor to pay the debt to the procurator. From this moment, then, the processual mandatum becomes irrevocable, but it does not matter whether it is a mandatum in rem suam or any other processual mandatum; for any processual agent becomes dominus litis by means of the formula. As regards its outward effect, a mandatum in rem suam is indistinguishable from an ordinary mandatum. As against the debtor, a mandatarius in rem suam is, like any other mandatarius, not a creditor, but merely a procurator, though, as against the mandator, he is not bound to hand over what he recovers in the action from the debtor.[1]

The civil law, however, in course of time advanced a step beyond this position. It gradually became a fixed rule that a mandatum in rem suam should be irrevocable, not from the moment of litis contestatio only, but from the moment when the mandatarius in rem suam gave the debtor notice of the fact that he had received his commission from the mandator. A clear distinction was thus established between a mandatum in rem suam and an ordinary processual mandatum. The latter was revocable up to the litis contestatio; the former was only revocable up to the moment of

[1] For a more detailed account of the history of processual agency in Roman law, see F. Eisele, *Cognitur und Procuratur* (1881); M. Rümelin, *Zur Geschichte der Stellvertretung im röm. Civilprocess* (1886); Wlassak, *Zur Geschichte der Cognitur* (1893).

notice. From the moment of notice the mandatarius in rem suam had a *right* to claim that the debtor should pay him, and him alone. It is in this fact that we find the first indication of the idea of *assignment*. The mandatarius in rem suam did not actually become the creditor, but he acquired the right to stand in the place of the creditor. What passed to him was not indeed the personal claim itself, but the right to insist on the fulfilment of the personal claim of another.

This course of development was completed by the praetor. The effect of the action of the praetor was to render mandata in rem suam (where the mandatary merely stood in the position of a procurator) unnecessary. By the praetorian law it was immaterial whether the creditor appointed the other his agent for purposes of the action or not, and whether the processual mandatum were validly revoked (prior to notice having been given) or not. The only matter of importance in the praetorian law was the transaction by which the obligation was expressed to be transferred, or assigned; the transaction, in other words—whether it were a sale, a gift, the grant of a dos, or any other—which was concluded in respect of the obligation and manifested an intention to transfer such obligation. According to the praetorian law, the mandatum ad agendum, granted in pursuance of a transaction by which the parties purported to transfer the obligation, was immaterial. The essential part was the transaction itself, in a word, the act of assignment. The praetorian law alone gave legal effect to an intention to transfer an obligation. The civil law merely recognized mandata authorizing the agent to assert the claim of *another* (viz. the mandator), and mandata of this kind became in certain circumstances irrevocable. The praetorian law, on the other hand, recognized an assignment as such (whether by way of sale, or gift, or otherwise); that is to say, it recognized transactions under which the mere declaration of the intention to assign entitled the assignee to sue on the obligation in his own name, to sue, in a word, for a claim *of his own*. The praetorian law, unlike the civil law, acknowledged a singular succession to obligations.

The action granted by the praetor to the assignee on the ground of an assignment, was an actio utilis, the name of the assignee thus appearing in the intentio itself.[2] This actio utilis was in no way

[2] It is difficult to say what form the assignee's actio utilis took. It was

affected by the revocation or death of the creditor. It operated at once to make the assignee creditor in respect of the debt due under the obligation. It was obvious, however, that a debtor who, not having received notice of an assignment, paid his original creditor what he owed, was, on equitable grounds, entitled to the benefit of such payment. Not till he received notice of a sufficiently definite kind could the debtor be bound by the assignment. The practical importance of notice thus remained the same. But whereas it had formerly served the purpose of enabling the new creditor to acquire a right of his own, it now merely served the purpose of enabling him to exclude a right of the debtor's, the right namely to pay the original creditor.

There is no assignment in the case of a novation (supra, pp. 386, 387). The effect of a novation is to cancel a pre-existing obligation, and to substitute in its place, by means of a new contract, a new obligation in favour of a new creditor. The practical result may be the assignment of an obligation, but in point of form a novation is never an assignment. A novation means invariably, not the transfer of a prior obligation, but the creation of a new obligation in place of an old one.

§ 88. *Liability for Debts contracted by Another.*

I. Master and Slave.

The delicts of a slave render the owner of the slave liable to a noxal action (supra, p. 425). Contracts made by a slave do not bind his master absolutely and in all circumstances, but only in the following cases: (1) if the master grants his slave a peculium; (2) if the contract is concluded by the authority (jussus) of the master.[1]

1. Where the master grants his slave a peculium, i.e. where he hands over to the slave certain property with directions to manage it independently—the slave, for example, employing his peculium for carrying on some business on his own account—in

clearly an actio ficticia. But what was the object of the fiction? Eisele (*Die actio utilis des Cessionars* (1887), pp. 26, 40 ff.) conjectures that there was a fictitious delegation (si Titius Num. Ao. delegavisset), but this view is justly objected to by Unger in Jhering's *Jahrbücher für Dogmatik*, vol. xxvi. p. 412.

[1] As to the history of the actiones adjecticiae qualitatis, see Karlowa, *Röm. RG.*, vol. ii. p. 1121 ff.

such a case the master can be sued by the praetorian actio de peculio in respect of any contract concluded by the slave (not, however, in respect of a transaction intended as a gift) and can be made liable to the extent of the peculium (peculio tenus). Since the peculium remains the property of the master (the slave being incapable of acquiring property), the master's liability in such cases affects his own property (though only to the extent of the peculium), but the debts for which he is liable are the contractual debts of his slave, i.e. the debts of *another*. The slave himself is only bound 'naturaliter' by his contracts (supra, p. 165). Whatever the slave owes his master—the slave may, for example, have borrowed money from his master for purposes of his peculium, and may have bound himself to repay it—diminishes the peculium, and, conversely, whatever the master owes the slave increases the peculium. Although, as between master and slave, there can be no civil law obligation, nevertheless their mutual contracts and quasi-contracts operate to increase and diminish the peculium. Thus, if a slave, acting as business agent (negotiorum gestor) of his master, concludes some transaction with a third party—if he, for example, borrows money and pays his master's debts with it—he (the slave) is entitled, on the analogy of the actio negotiorum gestorum contraria, to be compensated by his master to the extent to which the transaction in question was intended to benefit, and did in fact benefit, the master (cp. supra, p. 412). This claim to compensation against the master operates to increase the peculium pro tanto, so that, in measuring the extent to which the master is liable to third parties suing him by the actio de peculio, the amount of any such claim has to be taken into account. But creditors with whom a slave concludes transactions beneficial to his master, are not confined to an actio de peculio. They have a further remedy against the master called the 'actio de in rem verso'. In this action the master is liable to the extent to which the slave himself can claim—on the principle just explained of the actio negotiorum gestorum [2]—to be compensated by the master. Moreover in the actio de in rem verso the master is not entitled to deduct any claims which he may have against his slave on other grounds.

Where the peculium is given to the slave in order that he may carry on a mercantile business with it, the commercial creditors of

[2] von Tuhr, *Actio de in rem verso* (1895).

the slave can claim to have the merx peculiaris (i.e. the property invested in the business) distributed among themselves in the proportion of their respective claims. The master is not entitled in this case to deduct the amount his slave owes him; he is only entitled to rank as an ordinary creditor and to receive, as such, a proportionate satisfaction of his claims. If the master knowingly acts in violation of his duty to distribute the merx peculiaris in the proper proportions among the creditors, any creditor prejudiced thereby may sue him by the 'actio tributoria'.

2. If a slave concludes a contract by the authority (jussus) of his master, the creditor can sue the master by an actio quod jussu for the whole amount (in solidum). The authority need not be conferred in express reference to the particular contract; a general authority is sufficient to make him liable. If a master appoints his slave captain of a ship (magister navis), and thereby confers upon him, in a general way, all the powers incident to the duties of a ship-captain as such, any third party contracting with the slave in his capacity of captain (e.g. for the carriage of goods) may sue the master (as the owner of the ship, 'exercitor navis') by the actio exercitoria for the whole amount of his claim. Or again, if a master appoints a slave to act as his 'institor', i.e. as his authorized representative in any other kind of business—say, as a waiter or a clerk—any person contracting with the slave in his capacity of institor, or general business manager, may sue the master by the actio institoria, and render him liable—as in the former case—for the whole amount due under the contract.

II. Paterfamilias and Filiusfamilias.

A paterfamilias is liable on the contracts of his filiusfamilias in the same way in which a dominus is liable on the contracts of his slave. In some cases, therefore, the liability of the paterfamilias is restricted—for example, where he gives his son a peculium (profecticium, infra, p. 485), or where the son concludes a contract as his father's negotiorum gestor—in others, it is unrestricted, as where the father has authorized the son (either directly by an express authority, or indirectly by a general authority) to conclude the transaction in question. The actions by which a creditor can sue the paterfamilias in respect of a contract concluded by the filiusfamilias are precisely the same as those by which he can sue the dominus in respect of a contract concluded by the slave.

III. Principal and Agent.

A principal is liable on any contract concluded by his authorized agent—i.e. by a free person whom he (the principal) has chosen to act in his stead—provided that the agent, in concluding the contract, discloses the fact of his agency, in other words, explicitly refers to the commission under which he is acting (supra, p. 222). The actions available against a paterfamilias or dominus in respect of acts performed by the son or slave on the strength of general instructions, are equally available where the person instructed to transact business on behalf of another is sui juris. Thus the actio exercitoria and the actio institoria are equally applicable where a free person is appointed captain of a ship or manager of a business (institor). Wherever a person has been authorized in any other way to act on behalf of another—wherever, that is to say, in the case of an unfree representative the actio quod jussu would lie—there, if the representative is a free person, the actio quasi institoria is available. If the contract, though concluded without authority, was nevertheless entered upon in the interest of another party—such as a contract by a negotiorum gestor—the creditor with whom the contract was concluded may sue the other party by the actio utilis de in rem verso. The defendant is liable to the extent to which he himself would be compellable to compensate the negotiorum gestor.

IV. Nature of the Actions enumerated.

All the actions we have just enumerated are praetorian actions. It is a fixed rule of the civil law, to which there is no exception, that the liability for a contract shall attach in all cases to the contracting party himself, and not to the dominus, paterfamilias, or principal. A contract concluded by one person in the name of another, and operating as against that other, is a thing unknown to the civil law (supra, p. 221). The praetor, however, taking the liability of the contracting party—the only existing liability as far as the civil law was concerned—as his basis, granted the creditor the actions we have just discussed against the dominus, the paterfamilias, and the principal (dominus negotii) respectively. The praetorian action was 'superadded' to the civil law action: non transfertur actio, sed adjicitur. Both parties were liable to the creditor. The agent—that is, the person who had concluded the contract—was liable by the civil law, and could be sued by actio

directa. The dominus negotii was liable by the praetorian law, and could be sued by actio utilis. In a clause annexed to the formula the praetor explained why the liability of the real party to the contract gave rise to an action against another person who was under no liability whatever according to the civil law. Hence modern writers usually call these praetorian actions 'actiones adjecticiae qualitatis'. An actio adjecticiae qualitatis, then, is an action by which a person is sued in respect of a contract concluded by his representative, whether free or unfree. It is the same action as would be available, in each particular case, against the contracting party himself, qualified however by the clause referred to (adjecticia qualitas), which clause indicates at the same time the limits, if any, of the defendant's liability. If the contract in question is, for example, a sale, the vendor may proceed against the person represented (the dominus, paterfamilias, &c.) by the actio venditi de peculio, or the actio venditi de in rem verso, or the actio venditi institoria, &c., as the case may be. The actio adjecticiae qualitatis is a particular kind of actio utilis.

Roman law never advanced beyond the point of view that a contract concluded by a representative imposes, on principle, a liability, not on the person represented, but on the representative (i.e. on the contracting party), the point of view, in other words, that the liability of the person represented, where it occurs, is in all cases a liability for the act of *another*, for the act, namely, of the representative. Modern systems of law have adopted the other principle, viz. that a contract concluded by an authorized agent, acting in the name of the person he represents, is directly binding on the principal, so that the liability on which the principal is sued is not the liability of another, but his own. Actions of the type of the Roman actiones adjecticiae qualitatis are not to be found in the law of the German Civil Code. The progressive development of the legal principles of representation has rendered such actions impracticable and, at the same time, unnecessary.

§ 36 I. de action. (4, 6): Sunt praeterea quaedam actiones quibus non solidum quod debetur nobis persequimur, sed modo solidum consequimur, modo minus: ut ecce si in peculium filii servive agamus. Nam si non minus in peculio sit quam persequimur, in solidum pater dominusve condemnatur: si vero minus inveniatur, eatenus condemnat judex quatenus in peculio sit.

§ 1 I. quod cum eo (4, 7): Si igitur jussu domini cum servo negotium gestum erit, in solidum praetor adversus dominum actionem pollicetur, scilicet quia qui ita contrahit fidem domini sequi videtur. § 2: Eadem ratione praetor duas alias in solidum actiones pollicetur, quarum altera exercitoria, altera institoria appellatur. Exercitoria tunc locum habet cum quis servum suum magistrum navis praeposuerit, et quid cum eo ejus rei gratia cui praepositus erit contractum fuerit. Ideo autem exercitoria vocatur quia exercitor appellatur is ad quem cottidianus navis quaestus pertinet. Institoria tunc locum habet cum quis tabernae forte aut cuilibet negotiationi servum praeposuerit, et quid cum eo ejus rei causa cui praepositus erit contractum fuerit. Ideo autem institoria appellatur quia qui negotiationibus praeponuntur institores vocantur. Istas tamen duas actiones praetor reddit et si liberum quis hominem aut alienum servum navi aut tabernae aut cuilibet negotiationi praeposuerit, scilicet quia eadem aequitatis ratio etiam eo casu interveniebat.

§ 4 eod.: Praeterea introducta est actio de peculio deque eo quod in rem domini versum erit, ut quamvis sine voluntate domini negotium gestum erit, tamen, sive quid in rem ejus versum fuerit, id totum praestare debeat, sive quid non sit in rem ejus versum, id eatenus praestare debeat quatenus peculium patitur. In rem autem domini versum intellegitur, quidquid necessario in rem ejus impenderit servus, veluti si mutuatus pecuniam creditoribus ejus solverit, aut aedificia ruentia fulserit, aut familiae frumentum emerit, vel etiam fundum aut quamlibet aliam rem necessariam mercatus fuerit.

§ 89. *The Extinction of Obligations.*

An obligation may be extinguished either ipso jure, i.e. by the operation of the civil law, or ope exceptionis, i.e. by the operation of the praetorian law only. In the former case, the obligation is destroyed, for the civil law is concerned with the existence of rights. In the second case, the obligation is merely suspended, for the praetor is only concerned with the judicial assertion of rights. In the former case, moreover, the ground of extinction cannot itself be extinguished: the obligation must be re-constituted *de novo*. In the second case, it is conceivable that the efficacy of a ground of suspension may itself be suspended, the result being that the original obligation becomes freely enforceable once more.

I. Modes of Extinction operating ipso jure.

An obligation may be extinguished ipso jure in one of three

ways: (1) by a 'contrarius actus'; (2) by satisfaction of the creditor; (3) by subsequent impossibility of performance.

1. Contrarius Actus.

According to the old civil law payment in due legal form was required for the extinction of a debt. The mere fact that the creditor had actually obtained what was due to him—which constituted the solutio of the jus gentium—was not sufficient to extinguish the obligation. But in order to constitute payment in due legal form two things are necessary: first, the payment must satisfy the creditor; secondly, the fact that the creditor is thus satisfied must be solemnly expressed. In other words, payment in due legal form is a payment accompanied by a formal legal *discharge* of the debtor.

This rule of the early law was the source of the formal modes of extinguishing obligations which we find in the classical civil law. Formal modes of extinction are such modes as result in the discharge of a debtor by a mere formal or imaginary payment, an 'imaginaria solutio'. Owing to the tendency to formalism so characteristic of the old pontifical jurisprudence, this 'imaginary payment', by which the formal legal discharge of the debtor was effected, took the shape of a contrarius actus, i.e. of an act reversing the prior act by which the obligation had been created.

Among such formal modes of extinction 'nexi liberatio' requires to be mentioned in the first place. Nexi liberatio was a solemn legal act which was framed and designed to extinguish a nexi obligatio, i.e. an obligation incurred by means of a solemn loan per aes et libram with the words 'dare damnas esto' (supra, p. 50). It was employed, however, for discharging, not merely a debt contracted by a formal loan, but any debt in regard to which the debtor stood in the position of one who had been condemned by the judgement of a court, that is to say, a judgement debt and a legacy per damnationem (infra, § 115). At one time nexi liberatio was a genuine payment. The debtor was discharged by means of the aes weighed out to the creditor in the presence of the libripens and five witnesses, *and also by means of the form,* the 'certa verba', namely, by which the debtor himself declared that he was discharged from his obligation. When coined money was introduced, nexi liberatio became a purely fictitious payment. At first, indeed, it was regarded as a form which had to be employed in addition to the actual

payment, in order that the latter (which took place apart from the formal act) might operate as a valid discharge.[1] Subsequently, however, the bare form of nexi liberatio came to be treated as capable of extinguishing a nexi obligatio and other debts producing the same effect as nexum, that is, judgement debts and legacies per damnationem. Nexi liberatio thus became a form not only of payment, but also of release—a release accomplished by a solemn declaration made by the debtor himself in the presence of, and therefore with the consent of, the creditor, to the effect that he thereby stood discharged of his debt.

In the case of debts of any other kind the requisite legal formality of the payment was secured through a formal discharge from the creditor. Here again the pontifical jurisprudence succeeded in establishing the principle of the contrarius actus. On the payment of a debt contracted literis (§ 81), the discharge had to be formally given literis, i. e. by a 'literal' acceptilatio (p. 394). On the payment of a debt contracted verbis (§ 80), the creditor had to give a discharge verbis, by a 'verbal' acceptilatio. And, as in the case of nexi liberatio, so here, the debtor was freed, in the first instance, by the combined effect of both acts, the payment *and the release*, both which acts taken together constituted the one act of formal legal payment. Subsequently, however, the release was regarded as constituting in itself an imaginaria solutio, and, as such, was allowed to operate an extinction of the obligation.

This was the origin of acceptilatio (whether literis or verbis), i. e. of the formal contract of release which, in the shape of the verbal acceptilatio, plays so important a part both in classical Roman law and in the Corpus juris. Acceptilatio verbis is a discharge by stipulatio. The debtor asks the creditor whether he has received what he (the debtor) had promised, and the creditor answers in the

[1] Thus two things were needed: first, the form of nexi liberatio (per aes et libram); secondly, actual payment. The mere form, without more, did not originally discharge the debtor (cp. supra, p. 235, n. 11). That such was the case appears clearly from the fact (among others) that, to the very last, the only kind of debt that could be extinguished by nexi liberatio was one where the debtor stood condemned to pay such things as could be the objects of a contract of loan (supra, p. 305); from the fact, in other words, that nexi liberatio remained throughout a transaction with a clearly defined material character, a transaction, namely, by which the payment of a loan, or of a debt analogous to a loan, was effected. Cp. GAJ. iii. § 175.

affirmative: 'quod ego tibi promisi, habesne acceptum?' 'habeo'. According to the classical law, this verbal acknowledgement operates ipso jure to extinguish the creditor's claim under the stipulatio, because the words employed represent the old form of payment: the contrarius actus for the obligatio verbis contracta. But by the rule of contrarius actus only a verbal obligation (i. e. a debt created by stipulatio) can be extinguished by a verbal acceptilatio, just as a literal debt alone can be extinguished by a literal acceptilatio (p. 394). If it is desired to extinguish any other debts by acceptilatio verbis, those debts must first be transformed by novation (infra, under 2) into a debt by stipulatio. If the object of the parties is to obtain a general discharge and complete exoneration of the debtor by acceptilatio, the formula of the so-called stipulatio Aquiliana is employed for the purpose of first novating all the liabilities of one party as against the other (viz. by converting them into a debt by stipulatio), and then discharging those liabilities by a verbal acceptilatio. The stipulatio Aquiliana was thus a comprehensive stipulatio concluded for the purpose of effecting a comprehensive acceptilatio.

Acceptilatio literis fell into disuse together with literal contracts, so that in Justinian's law the acceptilatio verbis is the only recognized form of acceptilatio.

The Roman jurists extended the principle of contrarius actus to the extinction of consensual contracts (sale, hire, &c.) 'mutuo dissensu'. As long as neither party had done anything under the contract (re nondum secuta), so that the consensus was the sole binding element, an obligation contracted consensu could be extinguished by mutuus dissensus (contraria voluntate).[2]

L. 80 D. de solut. (46, 3) (POMPONIUS): Prout quidque contractum est, ita et solvi debet.

GAJ. Inst. III § 173: Est etiam alia species imaginariae solutionis per aes et libram; quod et ipsum genus certis in causis receptum est, veluti si quid eo nomine debeatur quod per aes et libram gestum sit, sive quid ex judicati causa debeatur. § 174: Eaque res ita agitur: adhibentur non minus quam quinque testes et libripens; deinde is qui liberatur ita oportet loquatur: QUOD EGO TIBI TOT MILIBUS CONDEMNATUS SUM, ME EO NOMINE A TE SOLVO LIBEROQUE HOC AERE AENEAQUE LIBRA: HANC TIBI LIBRAM PRIMAM POSTREMAM-

[2] On the above subject see Erman, *Zur Geschichte d. röm. Quittungen und Solutionsacte* (1883), and in the *ZS. d. Sav. St.*, vol. XX. p. 193 ff.

QUE EXPENDO SECUNDUM LEGEM PUBLICAM; deinde asse percutit libram eumque dat ei a quo liberatur, veluti solvendi causa.

§ 1 I. quib. mod. obl. toll. (3, 29): Item per acceptilationem tollitur obligatio. Est autem acceptilatio imaginaria solutio. Quod enim ex verborum obligatione Titio debetur, id si velit Titius remittere, poterit sic fieri ut patiatur haec verba debitorem dicere: QUOD EGO TIBI PROMISI, HABESNE ACCEPTUM? et Titius respondeat: HABEO. Sed et Graece potest acceptum fieri, dummodo sic fiat ut latinis verbis solet: ἔχεις λαβὼν δηνάρια τόσα; ἔχω λαβών. Quo genere, ut diximus, tantum eae obligationes solvuntur quae ex verbis consistunt, non etiam ceterae. Consentaneum enim visum est verbis factam obligationem posse aliis verbis dissolvi. Sed id quod ex alia causa debetur, potest in stipulationem deduci et per acceptilationem dissolvi.

§ 2 eod.: Est prodita stipulatio, quae vulgo Aquiliana appellatur, per quam stipulationem contingit ut omnium rerum obligatio in stipulatum deducatur et ea per acceptilationem tollatur. Stipulatio enim Aquiliana novat omnes obligationes et a Gallo Aquilio ita composita est: QUIDQUID TE MIHI EX QUACUMQUE CAUSA DARE FACERE OPORTET, OPORTEBIT, PRAESENS IN DIEMVE, QUARUMQUE RERUM MIHI TECUM ACTIO QUAEQUE ABS TE PETITIO VEL ADVERSUS TE PERSECUTIO EST, ERIT, QUODQUE TU MEUM HABES, TENES, POSSIDES, POSSIDERESVE, DOLOVE MALO FECISTI QUOMINUS POSSIDEAS: QUANTI QUAEQUE EARUM RERUM RES ERIT, TANTAM PECUNIAM DARI STIPULATUS EST AULUS AGERIUS, SPOPONDIT NUMERIUS NEGIDIUS. ITEM EX DIVERSO NUMERIUS NEGIDIUS INTERROGAVIT AULUM AGERIUM: QUIDQUID TIBI HODIERNO DIE PER AQUILIANAM STIPULATIONEM SPOPONDI, ID OMNE HABESNE ACCEPTUM? RESPONDIT AULUS AGERIUS: HABEO ACCEPTUMQUE TULI.

2. Satisfaction of the Creditor.

The gradual adoption of the view that the material satisfaction of the creditor is a fact capable, in itself, of producing a legal effect was associated with the increasing influence of the jus gentium over the jus civile. A formal legal payment ceased to be necessary; a mere informal payment, or anything equivalent to it, was regarded as sufficient. The legal forms of payment, on the one hand, and actual payment, on the other, followed independent lines of development. The former resulted (as we have just seen) in the formal contracts of release; the outcome of the latter—of payment, that is, stripped of all formality—was the 'solutio' of the classical Roman law.

Solutio means the performance of that which is due under an obligation, whether it is a money obligation or an obligation to

provide any other kind of thing, or whether the obligation arises under a loan or a lease or in any other way. Solutio is performance in the material sense of the term, and its power to effect a discharge is not, like that of the formal acts of payment in the early civil law, confined to specified cases, but operates generally. For in the case of solutio the discharge is due to the practical result of the act and is quite independent of any outward form. It is not necessary that the debtor himself should perform: it is open to any third party to perform in lieu of the debtor, unless the nature of the act itself renders such a course impossible. Nor again is it essential that solutio should be made to the creditor himself. The debtor may be just as effectually discharged by solutio to another person, to a creditor of the creditor, for example, or to a 'solutionis causa adjectus', i. e. to a person whom the debtor is entitled (by agreement with the creditor) to pay instead of paying the creditor himself.[3] Nor is it necessary that the creditor should receive precisely what is owed. The debtor is equally discharged by a so-called datio in solutum, i. e. by the giving of something which the creditor consents to accept in lieu of what is due. It may even happen that the creditor is satisfied without receiving anything at all under the particular obligation. That is what occurs in the case of a so-called concursus causarum lucrativarum. For example: if a specific thing (species) is due to me 'ex causa lucrativa'—i. e. by virtue of a gratuitous act or promise, such as a legacy or gift—and I happen to acquire the same thing by virtue of another causa lucrativa (whether legacy or gift)—in such a case the object of the first obligation (viz. the enrichment of the creditor by means of the species) is attained, and the fact that he is satisfied accordingly extinguishes the obligation even without any express solutio.

Novatio is akin to solutio. By novatio we mean the satisfaction of the creditor, not by actual performance, but by the substitution for the old debt of a new and rigorously unilateral promise to pay, a stricti juris obligatio. When literal contracts fell into disuse, stipulatio became the only means of producing a novation (supra, p. 386 ff.). A novation transforms an existing debt (either with or

[3] A solutionis causa adjectus is a person whom the debtor is *entitled* to pay by virtue of an agreement concluded with the creditor; a correal creditor, on the other hand (e.g. an adstipulator, supra, p. 389), is a third party whom the debtor is *bound* to pay (jointly with the other creditor, namely). A solutionis causa adjectus cannot sue the debtor; an adstipulator can.

without a change of parties) into a debt by stipulatio. The creditor is in a more favourable position than before. He is not required to go into the original facts of the case; it is enough if he can prove the conclusion of the stipulatio. It is the advantage thus gained by the creditor in respect of his legal remedy that constitutes the practical value of novation. The former debt is extinguished, provided only the parties have the so-called animus novandi, i.e. the (manifest) intention to create, not an accessory stipulatio—not, that is, a second ground of liability in addition to the first—but a genuine 'novating' stipulatio, by virtue of which the old debt is extinguished and a new ground of liability is substituted in lieu of the former one.

pr. I. quib. mod. toll. obl. (3, 29): Tollitur autem omnis obligatio solutione ejus quod debetur, vel si quis, consentiente creditore, aliud pro alio solverit. Nec interest quis solvat, utrum ipse qui debet an alius pro eo. Liberatur enim et alio solvente, sive sciente debitore sive ignorante vel invito solutio fiat. Item si reus solverit, etiam ii qui pro eo intervenerunt liberantur. Idem ex contrario contingit, si fidejussor solverit. Non enim solus ipse liberatur, sed etiam reus.

§ 3 eod.: Praeterea novatione tollitur obligatio, veluti si id quod tu Sejo debeas, a Titio dari stipulatus sit. . . Sed cum hoc quidem inter veteres constabat, tunc fieri novationem cum novandi animo in secundam obligationem itum fuerat, per hoc autem dubium erat, quando novandi animo videretur hoc fieri, et quasdam de hoc praesumtiones alii in aliis casibus introducebant, ideo nostra processit constitutio, quae apertissime definivit tunc solum fieri novationem quotiens hoc ipsum inter contrahentes expressum fuerit, quod propter novationem prioris obligationis convenerunt; alioquin manere et pristinam obligationem et secundam ei accedere.

L. 17 D. de O. et A. (44, 7) (JULIAN.): Omnes debitores qui speciem ex causa lucrativa debent liberantur, cum ea species ex causa lucrativa ad creditores pervenisset.

3. Impossibility of Performance.

The performance of an obligation may be rendered impossible by casus (as where the thing is destroyed without the debtor's act or default), or by confusio, i.e. by the merger of the qualities of debtor and creditor in one and the same person in consequence, for example, of a succession. In either case the object of the obligation has ceased to be attainable, and the obligation is ipso jure extinguished to the extent to which the impossibility is due to casus or confusio.

L. 33 D. de V. O. (45, 1) (POMPONIUS): Si Stichus certo die dare promissus ante diem moriatur, non tenetur promissor.

L. 95 § 2 D. de solut. (46, 3) (PAPINIAN.): Aditio hereditatis nonnumquam jure confundit obligationem, veluti si creditor debitoris vel contra debitor creditoris adierit hereditatem.

II. Modes of Extinction operating ope exceptionis.

1. Pactum de non petendo.

The praetorian law regards a pactum de non petendo, or informal agreement of release, as a general mode of extinguishing an obligation, whatever the ground may be on which the obligation rests. The formal contracts of release of the civil law, on the other hand, only operate, as we have seen above (under I. 1), on the principle of contrarius actus, an acceptilatio verbis, for example, only being capable of extinguishing a debt incurred by stipulatio. True, if the obligation is based on a bonae fidei negotium, the effect of a release is to debar the creditor, not only by the praetorian, but also by the civil law (ipso jure), from recovering anything under the contract, because it would be contrary to bona fides to allow a man to sue for a debt he has waived. But the efficacy of a release in a bonae fidei negotium is not due to the agreement of release as such, but is merely, like an indefinite number of other circumstances, one of the consequences involved in the bona fides underlying the transaction. In the case of a stricti juris negotium, a release is inoperative by the civil law (unless indeed it satisfies the requirements of contrarius actus). The debtor remains liable to pay notwithstanding the release, because an agreement of release as such is unknown to the civil law. Where, however, there was an informal release, the praetor granted the defendant an exceptio pacti de non petendo; for the praetorian law gave effect to an agreement of release as such. It might, however, happen that the parties subsequently concluded a new agreement by which the defendant promised payment in spite of the prior release (pactum de petendo). Where that was the case, the defendant's exceptio pacti de non petendo could be rebutted by the replicatio pacti de petendo, the final result being that the original obligation could be effectually sued upon. Inasmuch as the pactum de non petendo only took effect by the praetorian law, its force was merely to *suspend* the obligation; that is, it operated as a mode of extinction which might be extinguished again in its turn.

§ 3 I. de except. (4, 13): Praeterea debitor, si pactus fuerit cum creditore ne a se peteretur, nihilominus obligatus manet, quia pacto convento obligationes non omnimodo dissolvuntur. Qua de causa efficax est adversus eum actio qua actor intendit: SI PARET EUM DARE OPORTERE. Sed quia iniquum est contra pactionem eum damnari, defenditur per exceptionem pacti conventi.

2. Compensatio or Set-off.

Compensatio, or set-off, means the balancing of a claim and counter-claim of the same kind.[4] In the case of bonae fidei judicia the justice of allowing a defendant to urge a counter-claim had to be admitted, within certain limits, even by the civil law (ipso jure). It would have been contrary to bona fides, if judgement were allowed to go against the defendant simply, without any account being taken of the fact that he (the defendant) was entitled to claim things of the same kind from the plaintiff under the same contract (ex eadem causa). But here again the civil law, consistent with itself, declined to acknowledge that the defendant had any *right* of compensatio as such. It was a matter entirely within the discretion of the judge whether he would allow a set-off or not.[5] Wherever, therefore, the condemnatio of the defendant was qualified by a set-off, the qualification was, in the eye of the civil law, simply a consequence of the peculiar restriction imposed in bonae fidei actions on the right of the plaintiff—a restriction which debarred him from claiming any more than he was in good faith entitled to, and which was enforced by the judge by virtue of and in conformity with the 'officium judicis'. Where in an action on a bonae fidei negotium judgement was given in accordance with the civil law in favour of the defendant (or against the defendant, but for a smaller amount than was claimed) on the ground of a counter-claim arising from the same contract, such a result was due, not to any *right* of compensatio on

[4] There are many doubtful points in the history of compensatio. For a discussion of the questions in dispute and a careful statement of the different views that have been put forward, see E. Stampe, *Das Compensationsverfahren im vorjustinianischen stricti juris judicium* (1886), and Eisele's remarks thereon in the *Kritische Vierteljahrsschrift*, vol. xxix. p. 37 ff. See also F. Leonhard, *Die Aufrechnung* (1897); R. Leonhard, in *Pauly's Realencyclopädie, sub verbo* 'compensatio'; H. Siber, *Compensation u. Aufrechnung* (1899).

[5] GAJ. iv. § 63 (Studemund ed. 2): Liberum est tamen judici (viz. in the case of bonae fidei judicia) nullam omnino invicem compensationis rationem habere; nec enim aperte formulae verbis praecipitur, sed quia id bonae fidei judicio conveniens videtur, ideo officio ejus contineri creditur.

the part of the defendant, but merely to the requirements of bona fides which governed the officium judicis.

The absence of a right of set-off on the part of the defendant made itself felt at once in the actiones stricti juris. According to the civil law, a person who was sued on a loan was liable to condemnation notwithstanding the fact that he could prove a counter-claim against the plaintiff for a capital sum equal in amount to that which the plaintiff was seeking to recover from him.[6] It was through the action of the praetor that the existence of an admissible counter-claim, which was already a material fact in actiones bonae fidei, became a material fact in actiones stricti juris as well.

If the defendant pleaded an admissible counter-claim in the proceedings in jure—i.e. in the first stage of the suit, before the magistrate, prior to the granting of the formula (supra, p. 226)—the praetor would give effect to such a plea by inserting an exceptio doli in the formula (supra, p. 281). He would treat an attempt of the plaintiff to enforce a stricti juris negotium, without taking notice of a proper counter-claim on the part of the defendant, as an inequitable proceeding which, though permissible according to the civil law, he (the praetor) would refuse to allow. But the result of an exceptio doli of this kind, granted on the ground of a counter-claim properly set up by the defendant, was not a set-off, but a dismissal in toto of the plaintiff's claim (provided the defendant succeeded in proving his counter-claim in judicio), and that quite regardless of the amount of the counter-claim. Thus, what the praetor had done in the case of actiones stricti juris was not to introduce the principle of set-off, but to compel the plaintiff, by indirect means (viz. on pain of forfeiting his whole claim), to deduct the amount of the counter-claim himself at the time of commencing his action, or rather *before* the granting of the formula, i.e. before the litis contestatio.

The next step in the development of compensatio was effected by a rescript of Marcus Aurelius which provided that, where an exceptio doli was inserted in the formula in a judicium stricti juris on the ground of an admissible counter-claim, such an exceptio

[6] In negotia stricti juris a counter-claim ex eadem causa is obviously impossible, because a negotium stricti juris gives rise, by its very nature, to a merely unilateral obligation. The only counter-claim possible in such cases would therefore be one ex dispari causa.

should operate *by way of set-off*. In all cases, therefore, where an exceptio doli was thus inserted, the defendant, on making good his plea, was not for that reason entitled to have the claim against him dismissed in toto, but was only entitled to have it dismissed to the extent of his counter-claim. The necessity, however, for the praetorian remedy by exceptio doli remained unaffected, and if the defendant in an actio stricti juris failed to get such an exceptio inserted, he was precluded from raising a plea of set-off. In other words, the defendant in a judicium stricti juris was still obliged to set up his counter-claim in jure with a view to having an exceptio doli embodied in the formula. The civil law still refused to acknowledge any right of compensatio, and, where the principle of compensatio was admitted, it took effect, as before, not ipso jure, but only ope exceptionis, i.e. by virtue of the praetorian law.

But this exceptio doli of the rescript, operating by way of set-off only, was a very anomalous kind of exceptio. It is, as we have seen (supra, pp. 275, 282), the essence of an exceptio that it results in judgement being given for the defendant 'by way of exception'. And yet the purpose of this particular exceptio doli was in effect to determine, not *whether* the defendant should be condemned to pay, but *what* he should be condemned to pay.[7] Such an exceptio was not in reality an exceptio at all, because it involved, not an exception from, but rather an interpretation of, the order to condemn. The right of the plaintiff to have judgement given in his favour did not simply depend on the defendant's proving, or not proving, his exceptio doli, and the condemnatio continued, notwithstanding the exceptio, to be conditional on the truth of the intentio. The only question now was as to the amount in which the defendant would be condemned. In the same way it had formerly been the practice of the praetor, in granting a bonorum emtor (supra, p. 288) a right of action, to qualify such right by adding the words 'cum deductione'. That is to say, if the bonorum emtor sued for a debt due to the bankrupt, the judge was instructed to condemn the defendant 'cum deductione', i.e. to condemn him in the balance due from him to the

[7] In his definition of an exceptio in l. 22 pr. D. de except. (44, 1): 'exceptio est condicio quae modo eximit reum damnatione, modo minuit damnationem,' Paulus takes account of this exceptio doli by which effect is given to a counter-claim, but his own words '*condicio* quae *minuit* damnationem' serve, at the same time, to bring out very clearly the contradiction involved in such a definition.

bankrupt after deducting the amount, if any, due from the bankrupt to him. The condemnatio thus became an incerti condemnatio, even where the object of the bonorum emtor's claim was a certum.[8] The result was that an exceptio doli, when inserted for the purpose of enforcing a counter-claim, became the means whereby actiones stricti juris were in all cases converted into actions with a condemnatio incerti.

Assuming, then, that an exceptio doli has been inserted in the formula and that the defendant has succeeded in establishing his counter-claim in the action, a question will arise as to the true effect to be given by the judge to such counter-claim. It might be urged, on the one hand, that the plaintiff's claim should not be regarded as cancelled pro tanto till the moment when the judge has actually acknowledged the justice of the defendant's plea of set-off. On the other hand, it might be said that the plaintiff's claim ought to be treated as cancelled pro tanto from the moment when the claim and the counter-claim first co-existed. The question would be of importance where, for example, the plaintiff's claim carried interest with it and the defendant's counter-claim did not. If the former view were taken, the plaintiff might claim interest in the meanwhile; if the second view were taken, he had no such right. The question was this: Where the defendant raises a plea of set-off, ought such a plea to be regarded as constituting a legal disposition, in other words, as signifying a willingness on his part to conclude an *agreement* of set-off with the plaintiff (because, if so, the set-off could only operate prospectively and not retrospectively), or ought it to be regarded as the simple allegation of a *fact* (the fact of the existence of a counter-claim, namely) which operates automatically, without any act on the part of the defendant, and without any intention on the part of the plaintiff, to limit the binding force of

[8] The case of an argentarius, or banker, was treated somewhat differently. The prætor required a banker to sue his customer on a current account 'cum compensatione', because the relationship between banker and customer, which is based on a series of payments and counter-payments on a running account, gives rise to an obligation to pay, not the separate items, but only the balance. The intentio accordingly specified the balance claimed by the plaintiff, i.e. the excess of his claim over the amount due from him to the defendant. The intentio being certa, the plaintiff could thus only succeed, if the sum claimed by him in the intentio was really the precise amount due to him after balancing the account; whereas in proceedings 'cum deductione' the formula left it doubtful to what extent the claim would be diminished by the counter-claim.

the plaintiff's right to the excess of his claim over the counter-claim? In the latter case compensatio must be regarded as dating back retrospectively to the moment at which the counter-claim first came into existence. Roman jurisprudence decided in favour of the second alternative and expressed the view it adopted in the rule: *ipso jure compensari.* In all cases, however, the effect of the coming into existence of a counter-claim as such is not an immediate cancelling of the original claim, but merely a provisional linking together of claim and counter-claim. In order to convert a mere joinder into an extinction one of two things must happen: either the parties must voluntarily agree to set-off their reciprocal demands, or the defendant must successfully establish his plea of set-off in the action. In either case the original claim becomes irrevocably bound up with the counter-claim, and is thereby cancelled pro tanto. Up to the moment, however, when the two claims have become irrevocably bound up, payment of one of the debts, or even set-off of a different counter-claim, will operate to sever the provisional joinder of the claims. A counter-claim thus constitutes, in all cases, a mere ground of *set-off* operating ipso jure, the immediate effect of which is to weaken the force of the creditor's claim in favour of the debtor—an effect which may itself be reversed by other processes. But a counter-claim never constitutes a ground of *extinction* operating ipso jure. Where a counter-claim results in the extinction of an obligation, such a result does not arise ipso jure, but is invariably based either on an agreement or on a judicial decision, and in the case of a judicium stricti juris this judicial decision still depends, as it did before, on the prior grant of an exceptio doli by the praetor. So far then as a counter-claim has the power to *extinguish* a claim sought to be enforced by action, such a power is not derived from the civil law, but continues, as before, to be derived from the praetorian law; in spite of the rule 'ipso jure compensari' the counter-claim does not operate ipso jure, but continues, as before, to operate ope exceptionis. Justinian subsequently made a plea of set-off a ground of defence operating ipso jure in the processual sense of the term. According to Justinian's law a plea of set-off may be advanced at any stage of the action, and the judge need not be expressly authorized to take such a plea into account. The only condition required is that the counter-claim shall be easy of proof (liquida), i.e. the evidence necessary to establish it must not

delay the final decision of the suit. With this restriction Justinian admitted pleas of set-off in all cases whatever, in cases where the claims arose ex dispari causa as well as in those where they arose ex eadem causa, and even in cases where the plaintiff sought to assert a claim—e.g. for damages—by means of a real action. Certain specified cases only were excepted, e.g. the actio depositi directa. But even in Justinian's law the effect of a counter-claim, from the point of view of private law, was not to cancel the other claim ipso jure, but merely to suspend it—a further act (viz. an agreement or a judgement) being necessary to convert the suspension into an extinction.

L. 1 D. de compensat. (16, 2) (MODESTINUS): Compensatio est debiti et crediti inter se contributio.

L. 21 eod. (PAULUS): Posteaquam placuit inter omnes id quod invicem debetur ipso jure compensari, si procurator absentis conveniatur, non debebit de rato cavere, quia nihil compensat, sed ab initio minus ab eo petitur.

L. 11 eod. (ULPIAN.): Cum alter alteri pecuniam sine usuris, alter usurariam debet, constitutum est a divo Severo, concurrentis apud utrumque quantitatis usuras non esse praestandas.

§ 30 I. de act. (4, 6): In bonae fidei autem judiciis libera potestas permitti videtur judici ex bono et aequo aestimandi quantum actori restitui debeat. In quo et illud continetur ut, si quid invicem actorem praestare oporteat, eo compensato, in reliquum is cum quo actum est condemnari debeat.[9] Sed et in strictis judiciis ex rescripto divi Marci, opposita doli mali exceptione, compensatio inducebatur. Sed nostra constitutio eas compensationes quae jure aperto nituntur latius introduxit, ut actiones ipso jure minuant, sive in rem sive personales sive alias quascumque; excepta sola depositi actione, cui aliquid compensationis nomine opponi satis impium esse credidimus, ne sub praetextu compensationis depositarum rerum quis exactione defraudetur.

3. As to the extinction of obligations by litis contestatio, v. supra, p. 285.

According to the civil law capitis deminutio (even capitis demi-

[9] The words of the text (GAJ. iv. § 61) which was used in framing this passage were as follows: [In quo et illud] continetur ut, habita ratione ejus quod invicem actorem *ex eadem causa* praestare oporteret, in reliquum eum cum quo actum est condemnare. We have already observed that the principle of set-off as acknowledged by the civil law in the case of bonae fidei judicia (where it was regarded as a consequence flowing from the requirements of bona fides) was restricted to claims and counter-claims arising ex eadem causa. According to Justinian's law the nature of the legal ground on which the counter-claim rested was immaterial.

nutio minima, supra, p. 181) had the effect of extinguishing the contractual and quasi-contractual debts of the capite minutus. The praetor counteracted the mischief attending such a destruction of obligations by granting the creditors in integrum restitutio as against a capitis deminutio minima, and an utilis actio in eos ad quos bona eorum pervenerunt (l. 2 pr. D. 4, 5) as against a capitis deminutio media and maxima.

L. 2 § 1 D. de cap. min. (4, 5): Ait Praetor: QUI QUAEVE POSTEAQUAM QUID CUM HIS ACTUM CONTRACTUMVE SIT CAPITE DEMINUTI DEMINUTAE ESSE DICENTUR, IN EOS EASVE PERINDE QUASI ID FACTUM NON SIT JUDICIUM DABO.

BOOK III

FAMILY LAW AND THE LAW OF INHERITANCE

CHAPTER I

FAMILY LAW

§ 90. *Introduction.*

FAMILY relations, in so far as they are regulated by legal rules and are thereby invested with the character of legal relations, are relations of power: their effect is to subordinate one person, within certain limits, to the arbitrary authority of another person, i. e. to an authority founded on *private* law. A right of control based on family law produces subordination, not a mere obligation. It represents a power over free persons, and a power which curtails the freedom of those who are subject to it, because the person in whom the power vests is entitled to exercise it, up to a certain point, in his own interests alone, to exercise it, in a word, as he chooses. To this day the family constitutes a sphere of *private* personal control (supra, pp. 25, 26). Family relations affect not only the persons of those who are subject to the family power, but also their property. There is accordingly an intimate connexion between 'pure family law' (as the law concerning the relations of power within the family is called) and 'applied family law', or the law of the proprietary relations of the family.

A family gives rise to three forms of power corresponding to which there are three kinds of proprietary relations: first, the marital power, and the proprietary relations of husband and wife; secondly, the parental power, and the proprietary relations of paterfamilias and filiusfamilias; thirdly, the tutorial power, and the proprietary relations of guardian and ward. Thus Family Law is divided into three parts: (1) the Law of Marriage; (2) the Law of Patria Potestas; (3) the Law of Guardianship.

In order to supply a foundation for the whole subject-matter under discussion, it will be necessary to premise an explanation of the conception of a family, and of the terms by which the constituent groups of a family are denoted.

§ 91. *The Family.*

I. The Conception of a Family.

The word 'family', within the meaning of the Roman civil law, signifies an *agnatic* family, i. e. the aggregate of those who are bound together by a common patria potestas. 'Agnates' are all those who are subject to the same patria potestas or would have been subject to it, if the common ancestor were still alive. Agnatio is not produced by blood-relationship alone. A mother, as such, is not an agnate of her own children; she only becomes an agnate of her children if, in consequence of her marriage, she passes into the manus (i. e. the patria potestas) of her husband, and is thereby united with her children under the same patria potestas. In that case she is an agnatic *sister* of her own children. Again a man's grandchildren by his daughter are not his agnatic relations, because they fall under the patria potestas of their own father, or paternal grandfather, as the case may be (supra, p. 177), so that there is no patria potestas to connect them with their maternal grandfather. And conversely persons can be agnates without being blood-relations at all. Wherever patria potestas is artificially created by a juristic act (adoption or in manum conventio), the person adopted, or the wife, becomes an agnate, not merely of the adoptive parent, or the husband, but also of all the other agnatic relatives of the new agnate, because, according to the civil law, community of patria potestas is the sole criterion for determining whether any given persons are related or not.

The agnatic family of the civil law means the aggregate of those who belong to the same *household*. Community of patria potestas—whether the patria potestas be actually in existence, or whether it be merely ideal in the sense of continuing to exist only in its effects—means community of household, in the legal signification of the latter term. Community of household can only originate in one way, viz. through relationship on the father's side—per sexum virilem—and its formal foundation is a *legal* relation, viz. patria potestas,

which admits both of artificial creation (as in the above-mentioned cases of adoption and in manum conventio) and of artificial extinction (as in the cases of capitis deminutio minima, supra, p. 181).

The conception of a family according to the jus gentium is different. The family of the jus gentium is the *cognatic* family. It means the aggregate of those who belong, not to the same household, but to the same clan. Cognatio is relationship based on consanguinity. As the father is the type and representative of the agnatic principle, so the mother is the type and representative of the cognatic principle. Perhaps there was once even a time when cognatio could only be produced by relationship on the mother's side. In historic times, however, cognatio may mean relationship on the father's as well as on the mother's side. Agnatio thus ceases to be the opposite of cognatio, and merely denotes a narrower circle of relationship within the wider range of cognatio.

The essence of cognatio is community of blood, not community of household; and its foundation is a natural, not a legal relation. Hence (unlike agnatio) cognatio can neither be artificially extinguished nor can it be artificially created as such. When, however, agnatic relationship came to be regarded as a relationship existing within the larger limits of cognatio, the artificial creation of agnatio operated to confer on the new agnate the rights of a cognate as well, and, in that sense, *produced* cognatio.

The development of the Roman law of the family and of the Roman law of inheritance proceeded broadly on the following lines. The early (patrician) civil law recognized agnatio alone. Subsequently, and more especially through the agency of the praetor, the claims of cognatio asserted themselves, till ultimately, through the legislation of the Empire, cognatio succeeded in superseding its rival altogether. In this as in other departments of law the final completion of the development was due to Justinian, some of whose reforms on this subject were not effected till the publication of his Novels. Just as in the older times everything depended on agnatio, so in Justinian's law everything depended on cognatio. The civil law conception of a family was finally displaced by the conception of a family as recognized by the jus gentium.

§ 1 I. de leg. agn. tutela (1, 15): Sunt autem adgnati per virilis sexus cognationem conjuncti, quasi a patre cognati, veluti frater eodem patre natus, fratris filius neposve ex eo, item patruus et

patrui filius neposve ex eo. At qui per feminini sexus personas cognatione junguntur, non sunt adgnati, sed alias naturali jure cognati.

L. 10 § 4 D. de gradibus (38, 10) (PAULUS): Inter adgnatos igitur et cognatos hoc interest quod inter genus et speciem. Nam qui est adgnatus, et cognatus est, non utique autem qui cognatus est, et adgnatus est. Alterum enim civile, alterum naturale nomen est.

L. 195 § 5 D. de V. S. (50, 16) (ULPIAN.): Mulier autem familiae suae et caput et finis est.

II. The Constituent Members of a Family.

A family is divided into ascendants and descendants, on the one hand, and collaterals, on the other hand. Ascendants and descendants are said to be related to one another 'linea recta', i. e. the one descends from the other. Collaterals, on the other hand, are said to be related 'linea transversa' ('obliqua'), i. e. they both descend from a common ancestor.

The proximity or degree of relationship depends, in the case both of lineal and of collateral relations, on the number of generations which separate the persons in question. Quot generationes tot gradus. Thus father and child are related in the first degree, grandfather and grandchild in the second degree, brothers and sisters in the second degree, and so forth. Collaterals are said to be of the whole blood, when they have the same father and mother; they are said to be of the half blood, when they have either the same father or the same mother. The Romans apply the term consanguinei both to children who are of the whole blood (called by modern writers 'germani') and to children of the same father only. Children by the same mother only are called 'uterini'. Complex relationship occurs in the case of children of parents who are already related to one another. Affinity is the connexion which subsists between a person and the cognates of his or her spouse. Children not born in wedlock are only related to their mother and her cognates, not to their reputed father.

The 'gentiles' of the early Roman law were members of the same clan, or gens. The clan formed a wider group over and above the family and played an important part both in public and in private law (supra, p. 35 ff.). When the consciousness of a mutual connexion between clansmen was lost, the word 'gens' became merely a term for describing a group of persons with a common name, and as such

was devoid of legal significance. The only legal right enjoyed by gentiles as such at a later period was the right, in certain events, to succeed to the estate of a deceased clansman—a right which survived down to the early part of the Empire (infra, p. 530).

L. 1 pr. D. de grad. (38, 10) (GAJUS): Gradus cognationis alii superioris ordinis sunt, alii inferioris, alii ex transverso sive a latere. Superioris ordinis sunt parentes, inferioris liberi; ex transverso sive a latere fratres et sorores liberique eorum. § 1: Sed superior quidem et inferior cognatio a primo gradu incipit; ex transverso sive a latere nullus est primus gradus, et ideo incipit a secundo.

L. 10 § 14 eod. (PAULUS): Avia paterna mea nupsit patri tuo, peperit te; aut avia paterna tua nupsit patri meo, peperit me: ego tibi patruus sum et tu mihi.

CICERO Top. c. 6: Gentiles sunt, qui inter se eodem nomine sunt. Non est satis. Qui ab ingenuis oriundi sunt. Ne id quidem satis est. Quorum majorum nemo servitutem servivit. Abest etiam nunc. Qui capite non sunt deminuti. Hoc fortasse satis est. Nihil enim video Scaevolam pontificem ad hanc definitionem addidisse.

I. THE LAW OF MARRIAGE.

§ 92. *Marriage and the Modes of contracting it.*

Marriage is the full legal union of man and woman for the purpose of lifelong mutual companionship. Such a union is not complete, according to the early Roman law, unless the husband obtains the 'manus mariti', i.e. absolute power over the person of his wife. The effect of this power is to bring the wife under the domestic authority of her husband and, at the same time, to constitute her a member of his household. Hence marriages were usually concluded by means of an ancient traditional ceremony representing a purchase of the bride; in other words, by means of a mancipatio, the intending husband purchasing the daughter from the person in whose power she was, with a view to thereby acquiring that marital power without which marriage as a legal relationship was considered impossible.[1] A marriage of this kind was

[1] In later times the wife sells *herself*. In the same way in Germany the daughter was at first betrothed and given in marriage by the person in whose power she was (her father or guardian), but subsequently betrothed herself and gave herself in marriage, and consequently received the 'bride-

called 'coëmtio'. Besides coëmtio there was a religious form of marriage, called 'confarreatio'—like coëmtio, an institution of very ancient origin. A sacrifice offered to Jupiter with solemn words, prescribed by tradition (certa verba), and accompanied by certain ceremonies had the effect of formally uniting a man and woman for all sacrificial purposes, and consequently for lifelong companionship, and of placing the woman at the same time—for the two things were considered inseparable—in manum mariti. In the case of a coëmtio the husband's right to matrimonial cohabitation was the result of the power which he acquired over the wife; conversely, in the case of a confarreatio, the power acquired by the husband over his wife was the result of the right to matrimonial cohabitation which the ceremony of confarreatio conferred upon him. Coëmtio was the ordinary form in which any Roman citizen, whether patrician or plebeian, might contract a marriage. Confarreatio was a special form of marriage confined to the patricians.[2]

The marriage with manus, which was characterized by its peculiar and rigorous effects on the person and property (infra, § 93) of the wife, was part of the specifically Roman jus civile. Aliens were therefore debarred from marriages with manus, nor could they avail themselves of the forms by which such marriages were concluded. What was known as the 'jus connubii' of the Roman citizen—a right which, since the lex Canuleja of 445 B.C., applied equally to intermarriages between patricians and plebeians—consisted in the capacity to contract a Roman marriage *with manus*, a 'justum matrimonium', in other words, a marriage by virtue of which the wife, and consequently also the children, became members of the husband's household.

How strongly the idea prevailed that there could be no real marriage without marital manus is shown by the rule of the early civil law that, even where a marriage was concluded without the requisite forms, manus should arise at once as soon as the parties had in fact completed a period of uninterrupted matrimonial cohabitation, and had thereby given effect to their deliberate intention of living

price' and the dower from the bridegroom herself.—Cp. Karlowa, *Röm. RG.*, vol. ii. p. 158 ff.; Leist, *Altarisches jus civile*, vol. i. pp. 178, 179; R. Leonhard, in *Pauly's Realencyclopädie*, *sub verbo* 'coemptio'.

[2] As to the original forms of marriage in the ancient Aryan law which correspond to the forms mentioned in the text, cp. Leist, *Altarisches jus gentium*, p. 125 ff.

together as husband and wife. Just as a bride might be purchased, so she might be acquired by usucapio. Both these rules were in an equal measure the outcome of the ancient view which treated the daughter as a mere chattel belonging to her father. Land could be acquired by usucapio in two years; for all other things (ceterae res) one year was sufficient (supra, p. 319). Hence if a man took another's daughter to his home without lawful purchase or confarreatio, she became his wife by usucapio in the course of one year. And at the same moment she passed into his manus 'usu', as it was termed, and with the acquisition of manus the requirements of a full legal marriage according to the Roman civil law were satisfied.[3]

This whole development took place at a very early period, and carries the evidence of its great antiquity on the face of it. At the time of the Twelve Tables marriage by usus was fully recognized and very frequently resorted to. But what is more important is the testimony borne by the Twelve Tables to the fact that the foundation of marriage by usus—viz. the early notion that there could be no marriage without manus—had already been abandoned. We have here the first indications of a new development in the Roman law of marriage.

The criterion of matrimonial cohabitation is, as we have seen, that it should be uninterrupted. If therefore the woman absents herself from the man during the year of usucapio, with a view to interrupting the matrimonial cohabitation, the man's usus is 'broken' (usurpatio), and a marriage by usus becomes impossible.

One of the laws of the Twelve Tables dealt with the usurpatio which interrupts the usus of the matrimonial year and annuls its effect. This law provided that usurpatio should be deemed to have taken place, if the woman was absent from the house of the man for but three consecutive nights (trinoctium). The same law further

[3] The marriage by usus was probably the outcome of the most ancient form of marriage, viz. marriage by capture. Among many tribes the legality of marriages originating in forcible abduction is not recognized till after the expiration of a definite period. Cp. J. Kohler, *ZS. f. vergleichende RW.*, vol. v. (1884) pp. 342, 346, 364, 366. The Roman law of marriage likewise presupposes a time when marriages were effected by means of one of the two original modes, viz. either by the purchase or by the capture of the bride (witness the rape of the Sabine women). Cp. L. Dargun, *Mutterrecht u. Raubehe* (Gierke's *Untersuchungen zur deutschen Rechtsgeschichte*, xvi. (1883) pp. 100-102.—As to the origin and growth of the free marriage among the Romans, cp. Bernhöft, *ZS. f. vergleichende RW.*, vol. viii. (1888) pp. 197, 198.

provided that such a trinoctium, if repeated every year, should be sufficient for the purpose of permanently preventing manus from arising in respect of the marriage.

These rules testify to the working of ideas entirely different from those which, at an earlier date, had produced marriage by usus. It is obvious that this trinoctium of the Twelve Tables means merely a symbolical interruption of the cohabitation. The 'breaking' of the matrimonial cohabitation is a mere fiction which is employed for the sole purpose of preventing manus mariti from arising. A new conception of marriage is here clearly presented to our view: there can be marriage *without* manus. The early law assumed that usurpatio (i. e. the deliberate interruption of cohabitation by the parties themselves) was evidence of an absence of intention to marry. But in the new view of marriage which was gradually asserting itself a usurpatio might take place (by a mere trinoctium) notwithstanding the existence of an intention to marry. What the parties desired was, indeed, to marry, but to marry without manus, and it was this desire that the Twelve Tables sanctioned and gave effect to. So far from introducing marriage by usus, the Twelve Tables in reality afford the best evidence of its decline.

The adoption of the view that manus could be acquired by usus marks the first step in the process by which marriages informally concluded without coëmtio or confarreatio obtained the recognition of the law. If a man was in usucapio possession of the woman he wished to take to wife and was therefore certain that, after the lapse of a year, he would be his wife's lawful lord and husband, the relations subsisting between him and the woman prior to the expiration of the year were not in their nature extra-matrimonial relations, i. e. mere relations of fact, but were essentially matrimonial relations, i. e. *legal* relations, recognized by the statute and clothed by it with definite effects. Just as usucapio possession implicitly contained the idea of ownership (supra, p. 329) even before the period of usucapio was complete, so the usucapio possession of the woman implicitly contained the idea of marriage even prior to the expiration of the year of usus. In consequence, however, of the absence of manus in such cases, the view that marriages could be contracted without manus asserted itself simultaneously with the development of informally contracted marriages. And so completely were marriages without manus recognized as marriages even at the time of

the Twelve Tables that the device of the trinoctium was frequently resorted to for the sole purpose of preventing manus from arising in respect of a marriage.

Thus as early as the Twelve Tables we find two forms of marriage: marriage with manus and marriage without manus. The former kind of marriage—which is known as a 'strict' marriage—was an institution of the civil law in the technical sense of the term, being contracted by negotia juris civilis (coëmtio, confarreatio) or by usus (which was likewise juris civilis; supra, p. 310). Aliens were therefore disqualified from concluding marriages with manus. The other form of marriage—which is known as a 'free' marriage—was an institution of the jus gentium. It was open to aliens as well as to citizens, and was contracted by informal means. In a strict marriage the wife bore the honourable name of 'materfamilias', in a free marriage she was only 'uxor'.

At first marriages according to the jus gentium (without manus) did not, it is true, produce the legal effects which the Roman civil law attached to a justum matrimonium, or strict marriage. The wife remained in her own familia; in other words, she remained under the patria potestas of her father or under the guardianship of her relations, as the case might be. The children of the marriage followed their mother: in the eye of the law, therefore, they did *not* pass into the potestas of their own father and become members of his familia. Accordingly, as far as the civil law was concerned (cp. § 91), father and children were not related to one another at all. When, however, marriages without manus came to be recognized as true marriages, it followed naturally enough that the law should recognize the children of such marriages as being their *father's* children. It is in this sense that a marriage without manus came to rank, in the course of time, as a justum matrimonium, or marriage valid by the jus civile. We cannot assign the change to any particular statute, but it was doubtless the outcome of a gradual and spontaneous development of customary law. The legal result then was this: although the wife did not pass into the manus of her husband, and consequently did not pass into his family, nevertheless the children of the marriage were regarded as the husband's children, as subject to his patria potestas, and as members of his household (sui); in other words, the wife, though not a member of the household, bore her husband children who *were* members of his household,

and she did so just because she was legally his *wife*. Henceforth manus—i.e. agnatic membership of the household on the part of the wife—ceased, even by the jus civile, to be essential for the purpose of constituting a justum matrimonium, or lawful marriage. In the competition between jus civile and jus gentium the latter was once more triumphant. Manus, which had once been the foundation of the Roman law of marriage, now became a mere accessory, the absence of which in no way affected the validity of a marriage.[4]

The development we have just described was completed as early as the Republic. During the Empire informal free marriages definitely superseded marriages with manus. Coëmtio and confarreatio disappeared. Usus had lost its effect, and the trinoctium was therefore no longer required. In Justinian's law the rule was that a marriage could be concluded by any declaration of consensus, whatever the form of such declaration might be—consensus facit nuptias—provided only that what the parties to the declaration contemplated was an immediate entry upon the married state; that is to say, the consensus, in order to be operative, must be carried into effect at once by means of an actual commencement of matrimonial cohabitation—a commencement usually solemnized by a formal 'deductio in domum'. In Roman law a marriage is concluded by 'consensus nuptialis'. 'Consensus nuptialis' must be distinguished from 'consensus sponsalicius', that is, from an agreement to marry at some future time.

Engagements to marry were contracted by means of a stipulatio (sponsio, sponsalia). In Rome, however, stipulationes of this kind were never actionable (cp. p. 382, n. 1), though their actionability came to be recognized in the rest of Latium.[5]

Concubinatus was the name applied to certain quasi-matrimonial relations which, though involving some legal disabilities, were nevertheless acknowledged by the legislation of the Empire (since Augustus) as constituting likewise a mode of lawful union between a man and a woman for the purpose of permanent mutual companionship. A concubine, however, was not called uxor, nor did she share the rank and position of the man. Nor again did the

[4] See Karlowa's account of this subject in his *Röm. RG.*, vol. ii. pp. 167, 168. The views there expressed differ in some respects from those embodied in the text.

[5] Cp. Pernice, *Sitzungsberichte d. Berliner Akademie*, vol. li. p. 1194. A different view is taken by Karlowa, *op. cit.*, vol. ii. p. 178.

offspring of such a union (technically called 'liberi naturales') fall under the patria potestas of their father. A man who was married could not have a concubine at the same time. For concubinage, like full marriage, was in its nature monogamous, and was therefore incompatible with any other relation of a similar character.

'Contubernium' was the marriage of slaves. Such a union, though practically the same as a marriage, was not recognized by the law as a marriage.

§ 1 I. de patr. pot. (1, 9): Nuptiae autem sive matrimonium est viri et mulieris conjunctio, individuam consuetudinem vitae continens.

L. 1 D. de ritu nupt. (23, 2) (MODESTIN.): Nuptiae sunt conjunctio maris et feminae et consortium omnis vitae, divini et humani juris communicatio.

CICERO Top. c. 3: Genus enim est uxor; ejus duae formae, una matrumfamilias, earum quae in manum convenerunt, altera earum quae tantummodo uxores habentur.

GAJ. Inst. I § 110: Olim itaque tribus modis in manum conveniebant, usu, farreo, coëmptione. § 111: Usu in manum conveniebat quae anno continuo nupta perseverabat. Quae enim veluti annua possessione usucapiebatur, in familiam viri transibat filiaeque locum optinebat. Itaque lege XII tabularum cautum est ut, si qua nollet eo modo in manum mariti convenire, ea quotannis trinoctio abesset atque eo modo usum cujusque anni interrumperet. Sed hoc totum jus partim legibus sublatum est, partim ipsa desuetudine oblitteratum est. § 112: Farreo in manum conveniunt per quoddam genus sacrificii quod Jovi farreo fit, in quo farreus panis adhibetur; unde etiam confarreatio dicitur. Conplura praeterea, hujus juris ordinandi gratia, cum certis et sollemnibus verbis, praesentibus decem testibus, aguntur et fiunt. Quod jus etiam nostris temporibus in usu est. § 113: Coëmptione vero in manum conveniunt per mancipationem, id est per quandam imaginariam venditionem; nam adhibitis non minus quam quinque testibus civibus Romanis puberibus, item libripende, emit is mulierem cujus in manum convenit.

PAULI Sent. II tit. 20: Eo tempore quo quis uxorem habet concubinam habere non potest. Concubina igitur ab uxore solo dilectu separatur.

Eod. tit. 19 § 6: Inter servos et liberos matrimonium contrahi non potest, contubernium potest.

L. 30 D. de R. I. (50, 17) (ULPIAN.): Nuptias non concubitus, sed consensus facit.

§ 93. *Marital Power.*

Manus mariti is the marital power of the old type. It represents a particular form of the general power exercised by the head of a household over its members—a kind of counterpart of the patria potestas. An uxor in manu (materfamilias), being by virtue of the manus a member of her husband's household (a 'sua'), stands legally filiaefamilias loco. The relations between her and her husband—both as regards her person and her property—are governed by the same rules of law as govern the relations between father and child. As to his power over her person, the husband has full authority to chastise his wife, and, in some cases, even to kill her, just as he may chastise or kill his child. He may even sell her, as he may sell a child, into bondage. In cases of a very grave character he is required—not, however, by the law, but solely by custom and tradition—to consult a family council (judicium propinquorum). But even in those cases the power to which the wife is subject in respect of life and death is the *private* power of her husband and his family. It was only in the course of the subsequent development of the law—the tendency of which was, generally speaking, to improve the position of filiifamilias—that the effect of manus, like that of patria potestas, was stripped of much of its harshness. On the other hand, as regards the wife's property, the rule is the same as in the case of a child in power: whatever the wife acquires she acquires for her husband, and any property she may have at the time of her marriage passes in its entirety (per universitatem) to her husband by the necessary operation of law (infra, p. 462). And since the wife by marrying with manus becomes a member of a different household (viz. the familia of her husband), it follows that she changes her agnatic family and undergoes capitis deminutio minima in consequence of the conventio in manum (supra, p. 181).

The relations between a wife in manu and her children are governed by the same rules as apply between brothers and sisters. In an agnatic family, the source and foundation of which is the patria potestas (supra, p. 449), the wife can never, in point of law, be the mistress of the house, nor can she even share the headship of the family with her husband. In the house of her own husband she is, legally speaking (i.e. as far as the agnatic relationship is concerned), nothing more than the sister of her children, since she is subject to

the same general authority of the head of the household, the same patria potestas, as they are. The mother can never be the head of an agnatic family, that position being reserved for the father alone. In the eye of the law the wife is, like the children, merely one of the subjects of the agnatic household. It is but a crude kind of family law, this family law in which marriage is always accompanied by manus. It is incapable of differentiating between the several cases of family power. It knows of no special law of marriage corresponding to the relationship of husband and wife, the law of husband and wife being included within the law of parent and child.

The entire law of husband and wife acquires a very different aspect when viewed with reference to free marriages, or marriages without manus. The principle of subordination disappears and the principle of equality takes its place: man and wife are regarded as *partners*. Marriage law becomes something more than a particular application of the law of parent and child. The two are now clearly differentiated. The position of the wife as companion of her husband and joint ruler of the household, which voluntary custom assigned to her even under the old marriage law,[1] gradually finds legal expression. The law comes to recognize the distinction between the relationship of husband and wife, on the one hand, and father and child, on the other. The law of husband and wife becomes a special branch of family law. The wife ceases to be subject to the *paternal* power of her husband as the head of the household. She ceases to change her agnatic family, and consequently ceases to suffer capitis deminutio. If she was sui juris prior to her marriage (because, say, her father was dead), she continues to be sui juris after her marriage. If she was in her father's power prior to her marriage, she remains in the same patria potestas after her marriage, though the effect of this patria potestas is annulled, wherever it conflicts with the power of the husband. An uxor in manu, on the other hand, is always alieni juris, because she is always in the patria potestas of her husband or of the person in whose patria potestas her husband is (p. 177).

A free marriage is not however, by any means, a marriage

[1] Cp. Jhering, *Geist d. röm. Rechts*, vol. ii. part I (4th ed.), p. 203 ff. The author justly points out the fallacy of supposing that the actual (i.e. the social) position of wives in ancient Rome necessarily corresponded to their legal status as regarded from the formal point of view of the ancient marriage law.

without marital power. Indeed, it would be more correct to say that a free marriage is the only marriage where there is a genuine *marital* power, i. e. a power which, instead of being a mere copy of the patria potestas, is a special power peculiar to a husband as such. In a free marriage the husband has the marital power of the jus gentium, i. e. of Roman law in its advanced state of development; in the jus civile on the other hand (i. e. in Roman law in its undeveloped condition), the marital power (manus) is nothing more than a form of patria potestas.

The marital power in a free marriage consists in the husband's right to the companionship of his wife. If a third party deprives him of his wife's society—even though it be the wife's own father, acting by virtue of his patria potestas—the husband has the 'interdictum de uxore exhibenda ac ducenda'.[2] With the husband's right to the companionship of his wife is connected his right to decide all questions incident to the married life. It is he, for example, who determines where they shall reside, for the wife ipso jure shares her husband's domicile; it is he who decides on the education (including the religious education) of the children and on the nature and extent of the household expenditure. Thus even free marriages involve the principle of the wife's subordination to the will of her husband, but it is a subordination differing in kind from that of the children; it is a subordination modified by an infusion of the principle of partnership. The marriage with manus realizes the conception of the agnatic family. The father alone stands legally at the head of the household. The free marriage, on the other hand, realizes the conception of the cognatic family of the jus gentium. Both father and mother stand legally, as well as socially, at the head of the household. In spite of the fact that an uxor who married without conventio in manum was denied the honourable title of materfamilias—in clear token of the original view according to which marriages without manus were not perfect marriages at all—it was nevertheless precisely through the position

[2] This interdict, it is true, belongs to the post-classical law; it is referred to by Hermogenianus, who wrote in the middle of the fourth century. See the passage quoted at the end of this section. The only interdict on this subject that occurs in the praetorian edict is the interdictum de liberis exhibendis, item ducendis (infra, p. 483). We are told however that Antoninus Pius (in the middle of the second century), 'bene concordans matrimonium separari a patre prohibuit' (PAULI Sent. v. 6, § 15). Cp. Lenel, *Edictum*, p. 391, n. 4.

she occupied in the Roman household that the rights of the mother as such obtained the express recognition of the law. For it was only in free marriages that the wife's legal position coincided with her actual position in the household; there alone did she rank by law (though only by virtue of the jus gentium) as the mother—not the sister—of her children.

L. 2 D. de lib. exhib. (43, 30) (HERMOGENIAN.): De uxore exhibenda ac ducenda pater etiam qui filiam in potestate habet a marito recte convenitur.

§ 94. *The Proprietary Relations between Husband and Wife.*

(1) Marriage with Manus.

In a marriage with manus the proprietary relations between husband and wife were, as already observed (§ 93), the same as those between paterfamilias and filiusfamilias. Whatever belonged to the wife at the time of her marriage passed to the husband by the necessary operation of law, and the same fate befell all property acquired by her after her marriage, whether by gift, devolution, personal services, or otherwise. The wife stood absolutely filiaefamilias loco. As regards the liabilities contracted by her during her marriage, the husband was on principle as little answerable for them as he was for the contractual liabilities of his children. It was only in the particular and exceptional cases where the praetorian law made a father liable for the contracts of his children, that a husband could be similarly sued by an actio adjecticiae qualitatis (supra, § 88) in respect of a contract concluded by his wife. The wife's antenuptial liabilities ex contractu were destroyed by capitis deminutio (supra, p. 181). It was, however, considered unfair that the husband should acquire all his wife's antenuptial property without being answerable for her debts. Hence, if he refused to pay debts validly contracted by the wife prior to her marriage, the praetor would initiate bankruptcy proceedings in respect of the wife's antenuptial property, thereby treating the marriage as non-existent so far as such antenuptial property was concerned.

The wife's delictual liabilities had the same effect as those of a filiusfamilias, i.e. they rendered the husband liable to a noxal action (supra, p. 425). If the husband was unwilling to take the conse-

quences of the delict upon himself (by paying damages or the penalty, as the case might be), it was open to him to surrender his wife into the mancipium of the plaintiff, the wife being thereby placed servae loco (infra, p. 483). This was one of the cases where the husband's right to sell his wife into bondage acquired practical importance.

In compensation, as it were, for her rigorous subordination to her husband in proprietary matters, a wife in manu was entitled to exactly the same rights of succession on the death of her husband as though she had been a filiafamilias, i.e. she was reckoned, together with her children, among the 'sui heredes' of her husband (infra, pp. 509, 531–534).

GAJ. Inst. II § 98: quam in manum ut uxorem receperimus, ejus res ad nos transeunt.

Eod. IV § 80: Quod vero ad eas personas quae in manu mancipiove sunt, ita jus dicitur ut, cum ex contractu earum agatur, nisi ab eo cujus juri subjectae sint in solidum defendantur, bona quae earum futura forent, si ejus juri subjectae non essent, veneant.

(2) Marriage without Manus.

Unlike the marriage with manus the free marriage of the Roman jus gentium did not, on principle, affect the property of the wife in any way. Her antenuptial rights remained her sole rights; her antenuptial liabilities remained her sole liabilities. Whatever she acquired during her marriage by her own labour, by devolution, or otherwise, belonged to her alone. Her capacity for acquiring property and for incurring liabilities was the same as that of her husband. Nor was she in any way inferior to him in regard to her power of dealing with her property: she had unrestricted authority to dispose of her property in any manner she chose. The husband had no sort of legal control over his wife's estate. If the wife chose to entrust him with the management of her property—the so-called bona paraphernalia—the husband was thereby placed in the position of an agent whose duty it was to conduct the management in the interests of the wife and in accordance with her wishes (she could therefore revoke the authority at any time); but he could never claim to be entrusted with the management as a matter of right. In the free marriage of Roman law the principle of separate property was strictly applied. The property of both husband and wife remained unaffected by the marriage, not only during their joint lives, but

also after the death of either of them. According to the civil law a free marriage did not give rise to any mutual rights of succession as between husband and wife as such. It was only in later times that an indigent widow was allowed a limited claim against the property left by her husband, the idea being that she was entitled to something in the nature of maintenance even after the death of her husband (infra, p. 538). Nor did the praetor make any essential alterations in the law. True, there was in the praetorian law a rule of mutual succession between husband and wife (bonorum possessio unde vir et uxor, infra, p. 534), but that rule only took effect where none of the relations succeeded to the inheritance. Even the most distant relation (provided he was entitled to succeed at all) excluded the husband from succeeding to his wife, and the wife from succeeding to her husband.

There were only three rules of law applicable to free marriages which affected the proprietary relations between husband and wife: (1) the husband was bound to maintain his wife, and, generally speaking, to defray all the household expenses; (2) mutual gifts between husband and wife were void, and the property purporting to be given might be recovered at any time, provided only the gift was not merely another form of maintenance, but involved the making over of a substantial amount of property. If, however, the party who had a right to claim back the gift, died before or simultaneously with the donee, without having exercised such right, the gift was said to 'convalesce', i.e. to become valid ex post facto;[1] (3) husband and wife could not sue one another for theft. If either of them committed a theft in view of an approaching divorce, the praetor granted the injured party a special action called the 'actio rerum amotarum' in lieu of the actiones furti. The object of this action was merely to recover compensation; in other words, it was an actio rei persecutoria. It was thus only a substitute for the condictio furtiva, and the penal action (actio furti) was not available.

In other respects free marriages might be said to produce proprietary relations between husband and wife only in so far as they

[1] Thus the law treated a donatio inter virum et uxorem as though it were a mortis causa donatio (supra, p. 212). A donatio mortis causa was valid as between husband and wife, so that in this as in other respects donationes mortis causa were governed, not by the rules applicable to gifts, but by those applicable to legacies.

supplied the occasion for certain juristic acts, more especially for the constitution of a dos and a donatio propter nuptias.

L. 8 C. de pact. (5, 14) (THEODOS. et VALENTIN.): Hac lege decernimus ut vir in his rebus quas extra dotem mulier habet, quas Graeci parapherna dicunt, nullam, uxore prohibente, habeat communionem nec aliquam ei necessitatem imponat.

L. 1 D. de donat. inter vir. et ux. (24, 1) (ULPIAN.): Moribus apud nos receptum est ne inter virum et uxorem donationes valerent. Hoc autem receptum est, ne mutuo amore invicem spoliarentur, donationibus non temperantes, sed profusa erga se facilitate.

L. 28 § 2 eod.: . . . et sane non amare nec tanquam inter infestos jus prohibitae donationis tractandum est, sed ut inter conjunctos maximo affectu, et solam inopiam timentes.

L. 9 § 2 eod. (ULPIAN.): Inter virum et uxorem mortis causa donationes receptae sunt. L. 32 § 3 eod.: Ait oratio (Antonini): fas esse eum quidem qui donavit poenitere, heredem vero eripere, forsitan adversus voluntatem supremam ejus qui donaverit, durum et avarum esse.

§ 95. *Dos.*

The husband had to support the expenses of the joint household. It was customary, however, to give him a 'dos', i.e. to make over to him some property intended as a contribution, on the part of the wife, towards the defrayal of those expenses (ad matrimonii onera ferenda), and intended also as a provision in the interests of the wife, who was entitled to recover the dos after the termination of the marriage. The husband was bound on principle to restore the corpus of the dotal property to the wife on the dissolution of the marriage. It was only the use and the fruits of the dos during the marriage that he could claim absolutely for himself as a contribution towards the charges of the marriage state. In substance therefore the dos was the property of the wife (res uxoria), the husband's ownership being limited to the duration of the marriage. The agreement by which the dos was created thus resulted in a modification of the Roman principle of separate property, since the practical effect of the juristic act constituting the dos was to subject part of the property of the wife (or of the property intended for the wife) to the control of the husband for as long as the marriage relation subsisted.[1]

As a rule it was the wife's father who provided the dos, just as

[1] Cp. Wendt, *Pandekten*, § 301; Kuntze, *Cursus des röm. Rechts*, p. 625.

with us it is the wife's father who provides the marriage portion. The right to demand a dos belonged to the wife, and never to the husband, but what the wife was entitled to demand was that a dos should be given, not to her, but to her husband. A daughter, or granddaughter, had a legal right, based on cognatio alone and quite independent of agnatio, to require from her father, or paternal grandfather (as the case might be), the grant of a dos as a last act of maintenance. A dos provided by a person in fulfilment of a legal duty on his part to provide it was called a dos profecticia. A dos provided by any other person (e. g. the wife herself or her mother) was called a dos adventicia. A dos provided by a third party on an express condition, confirmed by stipulatio, that it should be restored on the dissolution of the marriage, was called a dos recepticia. As regards the form in which a dos was constituted, Roman law distinguished between 'dotis datio', 'dotis promissio,' and 'dotis dictio'. Dotis datio consisted in the immediate making over to the husband of the particular proprietary benefit—e. g. a right of ownership, or a usufruct—which it was proposed to confer on him by way of dos. Dotis promissio was a promise by stipulatio to make over such proprietary benefit to the husband dotis causa at some future date. Dotis dictio was a *simple* promise, to the same effect as a dotis promissio, made by the wife, or her debtor, or a male ascendant in whose power she was. Dotis dictio was the form which, in accordance with ancient custom, was employed at the time of the betrothal. The law of Justinian—following in this matter a law of Theodosius II—provided that any third party might, at any time, effectually bind himself by an informal undertaking to give a dos, the form of a stipulatio being no longer required. Thus in Justinian's law a dos was either given to the husband there and then (dotis datio), or it was promised to him (dotis promissio and dictio). A valid promise to give a dos in itself constituted the dos. The promise operated ipso vigore to augment the husband's property dotis causa by means of, and to the extent of, the obligation which it imposed on the promisor, so that, when the promisor fulfilled his promise, he did not thereby constitute the dos, but merely discharged and satisfied a subsisting obligation.

As soon as the dos was actually given to the husband, or as soon as the promise to give it had been fulfilled, he (the husband) acquired a legal right of free disposition over all such res dotales as were

conveyed to him in ownership. He had all the rights and remedies incident to ownership as such, including (amongst others) the right to alienate and to mortgage. In the eye of the law *he* was the owner of the dotal property, and no one else.[2] The fact that he was, as a rule, under an obligation to restore the dos afterwards, did not diminish the extent of his powers. But, though formally the dos belonged to the husband, in substance it was the wife's property (res uxoria). Hence it was that the lex Julia de adulteriis of the year 18 B.C. (which, in so far as it deals with this subject, is usually called the lex Julia de fundo dotali) prohibited the husband from alienating or mortgaging any fundus Italicus comprised in the dos. Justinian extended this prohibition to any fundus dotalis whatever. Not even the wife's consent could validate a mortgage, or (according to Justinian's enactment) a sale, of the fundus dotalis by the husband. The object of these provisions was to preserve the land intact for the wife, to whom it was presumed the dos would revert. A mere personal claim for compensation against the husband, when the latter had alienated property, was considered sufficient where movables were concerned, but insufficient where immovable property was concerned.

When the marriage was dissolved, the husband was bound, as a rule, to restore the corpus of the dos. He was not bound to restore, or pay compensation for, the fruits and the use he had had in the meantime. As to res fungibiles (supra, p. 305), he was required to return them in genere, i.e. to give back the same amount of things of the same quality as he had received. As to res non fungibiles, he was required to return them in specie, i.e. to give back the identical things he had received. If by reason of his act or default the identical thing was not forthcoming, if, for example, he had alienated it, or if it had been damaged through want of care on his part—his liability, however, was limited to the diligentia quam suis rebus adhibere solet (cp. p. 369)—he was bound to pay compensation.

In Roman law, the right of the wife to claim back the dos, and

[2] Just as the husband had full power to dispose of the res dotales where the latter were conveyed to him in ownership, so where the right he acquired by way of dos was not ownership, but, say, a right of usufruct or an obligatory right, he had full power to deal as he chose with the particular right so acquired, subject of course to such limitations as sprang from the nature of the right itself. If, for example, the dos consisted of a usufruct, the husband could not alienate it, because a usufruct is inalienable as far as the right itself is concerned.

the correlative duty on the part of the husband to return it to her, passed through three successive stages of development.[3]

1. According to the civil law of the Republic, the husband was legally entitled to keep the dos even after the termination of the marriage. Custom, it is true, made it incumbent upon him to restore the dos to the wife either by will after his death or—if they were divorced—by conveyance in his lifetime. It was not, however, in the nature of ancient law to erect a mere moral duty into a legal one. Ancient law recognized the husband as the sole owner of the dos, not only during the marriage, but also after its dissolution.

2. That is the reason why it became customary for the person giving the dos to bind the husband by an express agreement—viz. by a stipulatio known as the cautio rei uxoriae—to return the dos on the dissolution of the marriage. At a comparatively early date, however (about 200 B. C.), an action—the actio rei uxoriae—was granted for the recovery of the dos, even where there had been no express agreement as to its return, but by this action the plaintiff was only entitled to demand 'quod melius aequius erit'. The judex appointed to try the actio rei uxoriae[4] had power to exercise an unfettered discretion in regard to the dotal claim. And it was in the discretion of the judex as exercised in the actio rei uxoriae that the rules as to time and the so-called rights of retainer had their origin. As to the period within which the husband should be required to restore the dos, it was thought fair to allow him a reasonable time for the purpose: he was directed to pay capital moneys and other res fungibiles by three annual instalments (annua, bima, trima die), his obligation to make immediate restitution being confined to res non fungibiles, i. e. to things (such as land) which were assumed

[3] Bechmann, *Das römische Dotalrecht*, 2 vols., 1863, 1867; Czyhlarz, *Das römische Dotalrecht*, 1870; Dernburg, *Pandekten*, 5th ed., vol. iii. §§ 13, 14.

[4] The actio rei uxoriae, which was one of the oldest praetorian actions, was originally an actio in factum concepta the *condemnatio* of which directed the judex to condemn the defendant in 'what is fair' (a so-called actio in bonum et aequum concepta). Subsequently it assumed the form of an actio bonae fidei, that is, of an actio civilis (in jus concepta) the *intentio* of which contained a reference to bona fides (quidquid dare facere oportet ex bona fide). At the time when the praetor granted the action he was merely giving expression to the prevailing views as to the true legal position of the parties concerned, which explains why that which was originally a rule of praetorian law soon became in practice a rule of the jus civile. Cp. Pernice, *ZS. d. Sav. St.*, vol. xx. pp. 130, 131; Thomas, *Observations sur les actions 'in bonum et aequum conceptae'* (Nouvelle Revue historique de droit, 1901); Erman, *ZS. d. Sav. St.*, vol. xxiii. p. 499.

to be in his possession in the same condition as he received them. As to the rights of retainer, the husband was allowed, in calculating the amount to be restored, to make deductions in all cases propter res donatas, propter res amotas, and also propter impensas (i. e. on the ground of expenses incurred about the dos). If, moreover, the dissolution of the marriage was due to the fault of the wife, he might make a deduction propter mores, amounting, in the case of adultery (mores graviores), to one-sixth, in case of other offences (mores leviores), to one-eighth of the dos. A deduction was also allowed propter liberos, viz. one-sixth for each child, provided the total amount deducted did not exceed three-sixths of the dos. If the divorce was occasioned by the husband, he was likewise subjected to certain penalties. Thus he forfeited the benefit of the above-mentioned rules as to time. Propter mores graviores he was required to restore even res fungibiles at once; propter mores leviores he was required to restore res fungibiles in three half-yearly instalments. If the dos comprised res non fungibiles, he had further to restore part of the fruits (Ulpian., tit. 6 § 13). These rules (the effect of which was to curtail to some extent the discretion of the judex) received definite shape through the legislation of the Emperor Augustus. They rested on the fundamental idea that the right to demand a return of the dos was not—in spite of the protection it had received through the actio rei uxoriae—a fixed proprietary right conferring claims of a definite kind, but was essentially a right bound up with the family relations, a right, therefore, which required to be determined in accordance with equitable considerations and the circumstances of each case, nay even—and in this respect it was more like a mere moral than a legal right—in accordance with the personal conduct of the parties viewed as a whole. That is the reason why the assertion of the statutory claim to a return of the dos entailed, at the same time, an inquiry into the moral conduct of the husband and wife concerned.

Thus the right to sue for a return of the dos was based either on agreement or on statute. In the former case the actio ex stipulatu was available; in the latter, the actio rei uxoriae. Where the right was based on agreement, it was stricti juris, and was governed by the law of contract. The plaintiff's claim was rigorously confined to a return of the corpus of the dos. A claim for damages in lieu of the dos (cp. p. 388), such as was recognized in the statutory

action, was as inadmissible as were the statutory rules as to time or the rules of retainer. The statutory action, on the other hand, was governed by the principles applicable to dos, i. e. by the principles of family law. It was a bonae fidei action in which the defendant had the benefit of the rules as to time, and the claim of the plaintiff, so far from being confined to a simple return of the dos, might vary considerably according to the circumstances. The plaintiff might sue for something different from the dos (e. g. damages), or for something more, or less, than the dos. Where, for example, the divorce was due to the husband's misconduct, the plaintiff could recover something more than the dos; where, on the other hand, the husband was allowed to exercise his rights of retainer, the amount recoverable by the plaintiff fell short of the dos.

Like all contractual actions the actio ex stipulatu was transmissible to heirs. The actio rei uxoriae, on the other hand, like all actions appertaining to the law of the family, was not transmissible. It could only be employed by the wife herself, and not by her heirs. Consequently, if the marriage was terminated by the death of the wife, and there was no stipulatio binding the husband to return the dos, the husband was legally just as much entitled to keep the dos as he was under the civil law of the Republic. An exception to this rule was only made in favour of persons who gave a dos profecticia. Accordingly, where the marriage was dissolved by the death of the wife, the father, or grandfather, of the wife could avail himself of the actio rei uxoriae for the purpose of recovering the dos given by him in pursuance of his statutory obligation. In all other cases, however—including therefore all cases of a dos adventicia—the rule was maintained that, in the circumstances supposed, the husband was not legally compellable to restore the dos. Hence, if a third party gave a dos adventicia, he could only recover it by means of an actio ex stipulatu, in other words, he could only recover it, if the dos was a dos recepticia.

Thus, in the law prior to Justinian the husband's obligation to restore the dos was still a very restricted one. The husband continued to be acknowledged as the true owner of the dos even after the dissolution of the marriage, and it was only within certain limits that the law allowed the wife, or the person who provided the dos, to maintain an obligatory claim for a return of the dos side by side with the ownership of the husband.

3. The completion of this course of development was due to Justinian. In Justinian's law the husband was always bound to return the dos. The only case in which he was allowed to keep it was where the dissolution of the marriage was caused by the misconduct of the wife. The actio rei uxoriae became transmissible, i. e. it was granted not only to the wife, but also to her heir, though the heir was excluded in favour of a person who had given a dos profecticia, if any such person survived the wife. A right of retainer could only be claimed by the husband propter impensas *necessarias*, on the ground, that is, of expenses which were necessary for the preservation of the dotal property. For the rest, immovables had to be returned at once, movables within a year. The husband was, moreover, liable to pay compensation if he had alienated any of the movables, or if any of the res dotales had been damaged through want of proper care on his part.

Thus in Justinian's law the right to claim a return of the dos had become a definite proprietary right, and the statutory claim had been assimilated to the contractual one. Only a few traces of the old actio rei uxoriae remained. Justinian himself says that it was the object of his enactment to grant a statutory actio ex stipulatu in lieu of the actio rei uxoriae, but an actio ex stipulatu which should be bonae fidei in so far as it preserved (in regard to divorce, compensation, and impensae) certain features borrowed from the old actio rei uxoriae.

Justinian, however, went a step further. If the action for the recovery of the dos was brought by the wife herself (not by her heirs or by the person who gave the dos), she (the wife) was primâ facie entitled to sue *as owner* in respect of such of the res dotales as were, for the time being, in the possession of her husband. For the purpose, moreover, of securing the wife her legal right to recover the dos, Justinian gave her a privileged hypothec over the entire estate of her husband. In the event of the husband becoming impoverished, the wife was entitled to enforce her rights at once, even during the continuance of the marriage.

The upshot of these reforms in the law was that, on the dissolution of the marriage, the husband practically ceased to be owner of the dotal property. His estate became subject in all cases to a charge to secure the return of the dos, and, as against the wife, the termination of the marriage had the effect of extinguishing his ownership.

In all these rules as to the dos—in the rule prohibiting the alienation and mortgaging of dotal land and the rule requiring the husband to exercise care in regard to the dotal property, on the one hand, and in the rules concerning the restitution of the dos as shaped by Justinian's legislation, on the other hand—we can trace the gradual recognition by the law of a truth which had long been acknowledged in practice, the truth namely that the dos belonged in substance to the wife and only in form to the husband, the truth, in other words, that the dos was neither more nor less than a portion of the wife's property—res uxoria—which was entrusted for a certain time to the husband. The husband's ownership was thus reduced in law as well as in fact to a mere form; practically speaking, all that remained to him was the usufruct of the dotal property together with the right to manage it.[5]

Ulp. tit. 6 § 1: Dos aut datur aut dicitur aut promittitur. § 2: Dotem dicere potest mulier quae nuptura est, et debitor mulieris, si jussu ejus dicat, item parens mulieris virilis sexus, per virilem sexum cognatione junctus, velut pater, avus paternus. Dare, promittere dotem omnes possunt.

§ 3 eod.: Dos aut profecticia dicitur, id est, quam pater mulieris dedit, aut adventicia, id est ea quae a quovis alio data est.

L. 5 § 11 D. de jure dot. (23, 3) (Ulpian.): Si pater pro filia emancipata dotem dederit, profecticiam nihilominus dotem esse nemini dubium est, quia non jus potestatis, sed parentis nomen dotem profecticiam facit; sed ita demum si ut parens dederit. Ceterum si, cum deberet filiae, voluntate ejus dedit, adventicia dos est.

L. 14 C. de jure dot. (5, 12) (Diocletian. et Maximian.): Mater pro filia dotem dare non cogitur, nisi ex magna et probabili vel lege specialiter expressa causa, pater autem de bonis uxoris suae invitae nullam dandi habet facultatem.

Ulp. tit. 6 § 13: Mariti mores puniuntur in ea quidem dote quae a die reddi debet, ita ut propter majores mores praesentem dotem reddat, propter minores senum mensum die; in ea autem quae praesens reddi solet, tantum ex fructibus jubetur reddere quantum in illa dote quae triennio redditur repraesentatio facit.

§ 29 I. de action. (4, 6): Fuerat antea et rei uxoriae actio ex bonae fidei judiciis. Sed cum, pleniorem esse ex stipulatu actionem

[5] The lines upon which the development of the Roman law of dos proceeded were largely determined by the influence of Greek law, according to which the wife was the owner, as against both her husband and her father, of the property contributed from her side towards the expenses of the marriage. Cp. Mitteis, *Reichsrecht u. Volksrecht*, p. 230 ff.

invenientes, omne jus quod res uxoria ante habebat, cum multis divisionibus in ex stipulatu actionem quae de dotibus exigendis proponitur transtulimus, merito rei uxoriae actione sublata, ex stipulatu, quae pro ea introducta est, naturam bonae fidei judicii tantum in exactione dotis meruit, ut bonae fidei sit. Sed et tacitam ei dedimus hypothecam; praeferri autem aliis creditoribus in hypothecis tunc censuimus cum ipsa mulier de dote sua experiatur, cujus solius providentia hoc induximus.

L. 75 D. de jure dot. (23, 3) (TRYPHONIN.): Quamvis in bonis mariti dos sit, mulieris tamen est.

§ 96. *Donatio propter Nuptias.*

In Roman law a gift by a man to his betrothed was, on principle, as undoubtedly valid as a gift by a husband to his wife was, on principle, undoubtedly void (p. 464). A donatio *ante* nuptias was therefore essentially different from a gift made after the marriage. In the later Empire the term 'donatio ante nuptias' was applied, in a special technical sense, to a gift made by the intending husband (or by some other person on behalf of the intending husband) to the future wife with the express object of making provision for the pecuniary demands of the marriage state, and thereby enabling the marriage to take place. A donatio ante nuptias was thus primarily, not a gift in consideration of natural affection, but a gift with a perfectly definite material object—the object, namely, of endowing the future marriage with the requisite pecuniary means.[1] And it was this fact—the fact that donationes ante nuptias were intended to serve a specific material object—that distinguished such gifts from ordinary gifts between betrothed persons. The ultimate purpose of a donatio ante nuptias was to make a proper provision for the wife in the event of a dissolution of the marriage. If the wife was divorced from her husband through no fault of hers, she was entitled to demand that the donatio ante nuptias (which it was usual for the intending husband in the first instance merely to covenant to pay) should be actually

[1] It was in the Eastern Empire that the development of this juristic act took place. There a donatio ante nuptias had all along been regarded as an essential requirement of a valid marriage, having originated in the bride-price which the intending husband was expected to pay to the bride's father. As in German law, so here, what had at first been a gift to the bride's father, became a gift to the bride herself. Cp. Mitteis, *Reichsrecht u. Volksrecht*, p. 256 ff., and in the *Archiv für Papyrusforschung*, vol. i. (1900) p. 347 ff.

paid over to her. It happened very frequently that what the husband gave as a donatio propter nuptias was returned to him in the shape of a dos on the part of the wife—a so-called donatio ante nuptias in dotem redacta—so that, in point of fact, the property contributed by the husband supplied the means for furnishing the wife with a dos, the practical result being a further endowment of the wife with property which she was entitled to claim as her own on the dissolution of the marriage.[2] It was deemed essential that married women should have property of their own, so that they might not be left unprovided for in the event of the marriage being dissolved. In effect both dos and donatio ante nuptias were forms of married women's property; dos being the property which the wife derived from her own side, donatio ante nuptias the property she derived from her husband's side.

The Emperor Justinus, Justinian's father, ordained that a donatio ante nuptias might be validly increased even after the conclusion of the marriage. Justinian went a step further, and provided that a donatio ante nuptias might even be validly constituted after the marriage. The traditional name having thus become a misnomer, Justinian ordered that such gifts should in future be called donationes *propter* nuptias.

§ 97. *The Termination of Marriage.*

A marriage is terminated by the death of either party. In Roman law a marriage could also be dissolved by means of a juristic act on the part of the husband and wife.

A civil law marriage by confarreatio could only be dissolved by means of a formal act. The form which the pontifices adopted was modelled on the principle of contrarius actus (cp. supra, p. 434). That is to say, the parties who desired to dissolve a confarreate marriage by their own act, were required to resort to a 'diffarreatio', i.e. to a counter-sacrifice offered with certa—but 'contraria'—verba to Jupiter, the god of marriage. The co-operation of the pontiffs was as essential to the counter-sacrifice of diffarreatio as it was to the original sacrifice of confarreatio. This would seem to be the

[2] The donatio ante nuptias in dotem redacta, which the Romans borrowed from Greek law, was identical with the dos we read of in the Franco-Romanic books of law; cp. H. Brunner, *Die fränkisch-romanische dos*, in the *Sitzungsberichte d. Akademie d. Wissensch. zu Berlin*, vol. xxix. (1894) p. 545 ff.

explanation of the fact that a marriage by confarreatio could not be dissolved at will, for the pontiff might decline to co-operate where there was no ground which the jus sacrum recognized as sufficient to justify a divorce.

Marriages by coëmtio and usus, on the other hand, were dissolved by remancipatio, i. e. by a fictitious sale into 'mancipium', or bondage, followed by manumission on the part of the fictitious vendee. The remancipatio of a materfamilias corresponded exactly with the emancipatio of a filiafamilias (infra, p. 486). In this, as in other respects, the 'purchased' wife in manu was legally in the same position as a child. A paterfamilias might discharge (i. e. emancipate) his wife from his power in the same way as he might discharge his child. In its formal aspect a remancipatio was not so much an act of divorce, as an act of discharge, or repudiation. Here again the law recognized no difference between an uxor in manu and a child. A wife in manu was as little a free party to the act of divorce as a child was a free party to the act of emancipation. In the old law, therefore, the consent of the wife was not necessary. She had neither the power to require, nor the power to prevent, a divorce. The husband's legal authority in regard to the dissolution of a marriage with manus was as absolute as it was in regard to the other incidents of such a marriage. Only a wife married by confarreatio was protected from arbitrary divorce on the part of her husband by the necessity of a diffarreatio.

The rule was different in regard to a 'free' marriage, or marriage without manus. The dissolution of such a marriage (divortium) could be brought about either by mutual agreement between both parties or by the will of one party only. The essential element was thus the intention to dissolve the marriage. It was only for the sake of having some sure criterion of the seriousness of such an intention that Roman law required what was called a 'repudium', i. e. an actual execution of the intention to separate by means of an express notification addressed by one spouse to the other. Such a notification might be conveyed either by word of mouth or through a messenger; the lex Julia de adulteriis, with a view to facilitating proof, required the presence of seven witnesses. Accordingly a mere agreement to dissolve a marriage was not in itself sufficient to effect the dissolution; in addition to the agreement there had to be a repudium mittere (dare) on the part of one

of the spouses.[1] And as far as the right to bring about a divorce was concerned, the legal position of the wife was precisely the same as that of the husband.

The rules of divorce which were recognized in the case of free marriages were afterwards extended to marriages with manus. A wife in manu could not, it is true, directly effect the extinction of manus by means of a repudium. Nevertheless, according to the view of the later times, the wife's repudium operated indirectly to dissolve even marriages with manus, by compelling the husband in his turn to take all necessary steps for the purpose of extinguishing the manus. And in the end, when marriages with manus had fallen into disuse altogether, the rules of the jus gentium prevailed in regard to the dissolution and the conclusion of marriages alike.

Freedom of divorce—i. e. the right of either party to dissolve the marriage at will by simple notice to the other party—was not formally abolished even by the legislation of the Christian Empire. However causeless the repudium, its effect was to terminate the marriage. It was, however, provided that, where a marriage was dissolved without any statutory ground of divorce, the offending party should suffer certain penalties. Thus where a wife repudiated the marriage without sufficient cause, she was ordered to forfeit her dos; where the husband was the offender, he was deprived of his donatio propter nuptias, in other words, he was required actually to pay over the donatio he had covenanted to pay. And in the Christian Empire it was the primary purpose of a donatio ante (propter) nuptias to confer on a wife who was divorced without just cause a positive proprietary benefit at the expense of her husband (p. 473). That was why, on the conclusion of every marriage, the husband was required to contribute a donatio ante nuptias corresponding to the dos contributed on the part of the wife. Both

[1] The statements contained in the text are based on the arguments of K. Zeumer as set forth in his *Geschichte d. westgothischen Gesetzgebung*, vol. xxiv. (1899) of the *Neues Archiv d. Gesellschaft für ältere deutsche Geschichtskunde*, pp. 620-622. According to the view which had prevailed till then, divortium meant a divorce by mutual consent and repudium a divorce by unilateral act. Zeumer has clearly shown this view to be erroneous. Divortium was the general name for any kind of divorce, whether effected by agreement or by the act of one party only. By repudium, on the other hand, was meant the act by which one spouse notified the other of his or her intention to dissolve the marriage, the act, in other words, by which the divorce was actually carried into effect. Such an act was required by Roman law in all cases of divorce alike.

parties, as it were, gave a pledge for the maintenance of the matrimonial tie—a pledge which seemed necessary in order to counterbalance the freedom of divorce allowed by the law.

L. 2 C. de inutil. stip. (8, 38) (ALEXANDER): Libera matrimonia esse antiquitus placuit, ideoque pacta ne liceret divertere non valere: et stipulationes quibus poenae inrogarentur ei qui divortium fecisset, ratas non haberi constat.

L. 9 D. de divortiis (24, 2) (PAULUS): Nullum divortium ratum est, nisi septem civibus Romanis puberibus adhibitis praeter libertum ejus qui divortium faciet.

FESTUS: Diffarreatio genus erat sacrificii quo inter virum et mulierem fiebat dissolutio; dicta diffarreatio, quia fiebat farreo libo adhibito.

GAJ. Inst. I. § 137: Mancipatione desinunt in manu esse, et si ex ea mancipatione manumissae fuerint, sui juris efficiuntur . . . (ea quae cum viro suo coëmptionem fecit virum suum) nihilo magis potest cogere quam et filia patrem. Sed filia quidem nullo modo patrem potest cogere, etiam si adoptiva sit; haec autem virum repudio misso proinde conpellere potest atque si ei numquam nupta fuisset.

§ 98. *Second Marriages.*

If either parent re-married, the interests of the children of the first marriage were protected (in the later Roman Empire) by a number of legal rules the effect of which was to confer certain benefits on the children and to impose certain disabilities—the so-called poenae secundarum nuptiarum—on the parens binubus. The most important of these rules was that which declared that all the property which the parens binubus had acquired gratuitously from his or her deceased spouse, whether by way of gift, dos, donatio propter nuptias, or testamentary disposition—the so-called lucra nuptialia—should become ipso jure the property of the children of the first marriage at the moment of the conclusion of the second marriage, and that only a usufruct should be reserved for the parens binubus.

A widow was not allowed to re-marry before the expiration of her year of mourning. If she violated this rule, she suffered infamy; her rights of succession were curtailed (she being more especially disqualified from taking any property by will, cp. infra, p. 566), and her power to dispose of her property in favour of her second husband was subjected to certain restrictions.

§ 99. *Celibacy and Childlessness.*

The extent to which the ancient spirit of Rome had deteriorated even in the early days of the Empire, is strikingly shown by the comprehensive series of marriage laws (the lex Julia de maritandis ordinibus 4 A. D., and the lex Papia Poppaea 9 A. D.) which the Emperor Augustus considered it necessary to enact. One of these laws prohibited senators and their children from intermarrying with freedmen or infames, and freemen from intermarrying with infames. Others—such as the law that a woman who, being an ingenua, bore three, or, being a liberta, four children, should be free from the tutela mulierum—were deliberately designed to promote marriages and to encourage the bearing of children. The same policy found expression in the corresponding penalties imposed on celibacy and childlessness. Caelibes and orbi (i. e. persons who remained unmarried without sufficient cause and childless persons) were declared incapable—'incapaces'—of taking property under a will (infra, p. 566), caelibes being treated as totally incapable, orbi as partially incapable. It was further provided that a woman should not be allowed to take all the property given to her by a will, unless she had the 'jus trium vel quatuor liberorum', but the emperor had the power to bestow this right by way of privilege on a woman who had not in fact the requisite number of children. A testamentary gift to an incapax becomes 'caducum', and, as such, may be claimed by the persons taking a benefit under the will who have children, or in default of such persons by the treasury (caducorum vindicatio).

The penalties on celibacy and childlessness were abolished by enactments of Constantine and subsequent emperors; Justinian did away with the above-mentioned prohibitions on intermarriages.

GAJ. Inst. II § 286: Caelibes per . . . legem Juliam hereditates legataque capere prohibentur; . . . item orbi . . . per legem Papiam ob id quod liberos non habebant dimidias partes hereditatum legatorumque perdunt eaque translata sunt ad eos qui in eo testamento liberos habent, aut, si nullus liberos habebit, ad populum.

ULP. tit. 17 § 1: Quod quis sibi testamento relictum, ita ut jure civili capere possit, aliqua ex causa non ceperit, caducum appellatur, veluti ceciderit ab eo, verbi gratia si caelibi . . . legatum fuerit nec intra dies centum caelebs legi paruerit.

II. Patria Potestas.

§ 100. *The Modes in which Patria Potestas originates.*

Patria potestas might either arise by operation of law or it might be artificially created by a juristic act. It arose by operation of law, first, in respect of children begotten in lawful wedlock (not in respect of the offspring of a concubine), and, secondly, from the legitimation of children not begotten in lawful wedlock, whether such legitimation were effected 'per subsequens matrimonium' or 'per rescriptum principis'. The juristic act by which patria potestas could be artificially created in Roman law was adoption.

Of adoption there were two kinds. The person adopted might be either a paterfamilias, in which case the adoption was called arrogatio, or a filiusfamilias, in which case it was called adoption, in the narrower sense of the term.[1] In either case the person adopted underwent capitis deminutio minima, because he changed his agnatic family (p. 181).

1. *Arrogatio.*

According to the old law every arrogatio required a preliminary investigation by the pontifices and a decree of the comitia curiata. At a subsequent period arrogatio by imperial rescript came into use, and in the later stages of Roman law this was the only form employed in ordinary cases. At no time, however, could an arrogatio be effected by a mere private juristic act. A change of family relations such as was involved in an arrogatio was regarded as a matter of public concern. Hence the necessity for ceremonies of a public character. No one, however, could be adopted by arrogatio in the comitia curiata, unless he was himself capable of declaring his assent to the arrogatio in the popular assembly. Since every arrogatus was a party to the act of arrogatio as carried out in the comitia, it followed that he must have the necessary qualifications to enable him to participate in that act in the comitia curiata. Consequently there could be no arrogatio of an impubes or of a woman. An impubes was legally disqualified from giving any valid assent at all, and women were incapable of appearing in the popular assembly. Antoninus Pius, however, permitted the

[1] As to the meaning of the terms paterfamilias (homo sui juris) and filiusfamilias (homo alieni juris: a son, daughter, grandchild in paternal power) cp. supra, p. 177.

arrogatio of an impubes on certain conditions, viz. that it should prove to be for the benefit of the impubes, that it should be agreed to by all his guardians, and, finally, that the pater arrogans should give security that, if the arrogatus died within the age of puberty, he (the arrogans) would restore the property of the arrogatus to such persons as, but for the arrogatio, would have been entitled to the succession of the arrogatus. The arrogatio conferred on the impubes, during impuberty, an indefeasible right to one-fourth share of the property left by the pater arrogans on his death—the so-called quarta divi Pii. In acquiring power over the person of the arrogatus, the pater arrogans acquired at the same time all the property belonging to the arrogatus,[2] and also power over those who were in the power of the arrogatus at the time of the arrogatio.

2. *Adoption.*

An adoption, in the narrower sense of the term, could be effected by means of a private juristic act. The development of this act dates from after the Twelve Tables. The Twelve Tables provided that if a father sold his son thrice into bondage, the patria potestas should be thereby extinguished. Just as this rule had supplied a device for accomplishing the emancipation of a filiusfamilias (supra, p. 58), so it might be utilized for the purpose of effecting a datio in adoptionem.[3] The father sells his son thrice by mancipatio into bondage (mancipium, infra, p. 483). The fictitious vendee manumits the son after the first and second sale by a manumissio vindicta, i. e. by means of an in jure cessio (supra, p. 167). After each act of manumission the son reverts into the power of his father. The third sale is not followed by a further act of manumission—the effect of which would be to emancipate the son (infra, p. 486)—but by the act of adoption in the form of an in jure cessio.

[2] According to the civil law arrogatio extinguished the contractual debts of the arrogatus (p. 181). The praetor, however, granted an in integrum restitutio by allowing the creditors to bring an actio ficticia against the arrogatus, the fiction being that the arrogatio had never taken place. If the pater arrogans declined to take upon himself the liabilities of the arrogatus (the latter having of course ceased to have any assets himself), the praetor initiated bankruptcy proceedings in respect of such property as would have belonged to the arrogatus had no capitis deminutio taken place. Cp. p. 462.

[3] This is a reasonable inference from the fact that the private act of 'datio in adoptionem' is plainly the outcome of that interpretatio of the Twelve Tables of which we have spoken above (supra, p. 58 ff.).

That is to say, the adoptive father raises a fictitious vindicatio in patriam potestatem before the praetor; the fictitious defendant either confesses or makes default, and the praetor thereupon makes his addictio, awarding the child to the fictitious plaintiff as his son. For the purposes of this last in jure cessio it was usual for the fictitious vendee first to remancipate the child to the father after the third mancipatio, the result being that the father himself became the fictitious defendant in the datio in adoptionem, and consequently brought about the adoption himself by means of his confessio in jure. If the person to be adopted was a daughter or grandchild, a single sale was sufficient to extinguish the patria potestas, and the first mancipatio was therefore immediately followed, not by an act of manumission—which would have operated to emancipate the child—but by the act of adoption. The law of the later Empire abolished these complicated ceremonies. All it required was that the two fathers should be agreed as to the adoption, and that they should make a declaration to that effect before the court in the presence of the child. In this instance, the child himself was not a party to the transaction by which he was given in adoption. There were therefore no such obstacles as existed in the case of an arrogatio to prevent an impubes or a daughter from being adopted. The assent of the adopted child was unnecessary. But if the child, being legally capable of willing, protested against the adoption, the adoption was invalid.

Under Justinian adoption, in the narrower sense of the term, ceased to create patria potestas. Datio in adoptionem, according to Justinian's law, did not operate, in a general way, to produce the relations of father and child, but merely gave the adopted child the same rights of succession in respect of the estate of his adoptive father as he would have had if he had been a real child of the latter. An adoption of this kind was known as an 'adoptio minus plena'. An 'adoptio plena', i. e. an adoption producing the full effect that formerly attached to adoptions, only occurred in Justinian's law where the adoptive parent was a natural ascendant (e. g. the grandfather) of the adopted child. As regards arrogatio, however, its effect was not altered by Justinian.

Women were incapable of adopting. From the time of Diocletian women whose children had died were allowed to adopt by means of a rescriptum principis; but the only effect of this so-called adoption

was to create mutual rights of intestate succession as between the adoptive mother on the one hand, and the adopted child and his descendants on the other hand.

pr. I. de adopt. (1, 11): Non solum tamen naturales liberi secundum ea quae diximus in potestate nostra sunt, verum etiam ii quos adoptamus. § 1: Adoptio autem duobus modis fit: aut principali rescripto aut imperio magistratus. Imperatoris auctoritate adoptamus eos easve qui quaeve sui juris sunt. Quae species adoptionis dicitur adrogatio. Imperio magistratus adoptamus eos easve qui quaeve in potestate parentum sunt, sive primum gradum liberorum optineant, qualis est filius, filia, sive inferiorem, qualis est nepos, neptis, pronepos, proneptis.

§ 3 eod.: Cum autem impubes per principale rescriptum adrogatur, causa cognita adrogatio permittitur et exquiritur causa adrogationis an honesta sit expediatque pupillo, et cum quibusdam conditionibus adrogatio fit.

§ 101. *The Effect of Patria Potestas.*

The patria potestas of the old civil law conferred on the father an absolute power over those who were subject to his control: his children, the children of his sons, and his wife in manu. He had the power of life and death (jus vitae ac necis) and the power of selling into bondage. The only actual check on his absolute authority lay, on the one hand, in the influence exerted by the relations in the family council (which custom required him to appeal to in cases of gravity) and, on the other hand, in the fear of a 'nota censoria' and the spiritual punishment which threatened him in the event of his abusing his power. Sales into bondage, where the member of a family was treated as a mere chattel representing a certain money value, must have been of tolerably frequent occurrence. An attempt to check such sales is found as early as the Twelve Tables, which contain a penal provision to the effect that a father who sells his son thrice into bondage shall be punished by forfeiting his patria potestas (supra, p. 58). In later times the mancipatio of a filiusfamilias was, as a rule, only employed for the purpose of a fictitious sale in effecting an adoption (supra, p. 480) or emancipation (infra, p. 486). Genuine sales of children only occurred in cases of noxae datio and, so far as such sales applied to filiifamilias, they were not abolished till Justinian. That is to say, down to the time of Justinian a paterfamilias whose child committed

a delict was entitled and bound, either to take upon himself the consequences of such delict, or to hand over the child by mancipatio into the bondage of the injured party (noxae datio, supra, p. 425). A child mancipated in such circumstances was said to be 'in mancipio' and stood legally in the position of a slave (servi loco): whatever he acquired, he acquired for his master and, like a slave, he could only be restored to full liberty by manumission. Justinian abolished the right of noxae datio and with it the last remnant of the paterfamilias' right of sale. The jus vitae ac necis had fallen into desuetude long before.

In the Empire patria potestas no longer conferred on the father the full powers of the old jus civile, but only those powers of chastisement and correction which the jus gentium recognized as naturally appertaining to the paternal authority.

As against his child, there was no necessity for the father to resort to legal proceedings, because the position of personal subordination in which the child stood to the father conferred upon the father an arbitrary power of private compulsion. If he found this power inadequate, he might invoke the assistance of the magistrate, who would dispose of the matter by administrative means, i. e. by virtue of his cognitio extraordinaria. On the other hand, as against a third party who obtained possession of the child and exercised power over him, the old civil law gave the father a vindicatio in patriam potestatem (filii vindicatio); at a later date the praetor granted the father a remedy called the 'interdictum de liberis exhibendis', by which the defendant was required to produce the child. If, however, the third party did not himself claim power over the child, but only appeared in the capacity of 'defensor' of the child for the purpose of objecting to the taking home—the 'ductio'—of the child by the father, in such a case the father's remedy for meeting the objection of the defensor was the prohibitory interdictum de liberis ducendis.[1] If the existence of the patria potestas was in dispute, if, in other words, the primary object of the father was to obtain an acknowledgement of his paternity, or of his paternal power, from the child or a third party, he (the father) might have recourse to a praejudicium, just as, conversely, a child who denied the existence of the patria potestas might bring about a praejudicium for the purpose of obtaining a decision of the question (supra, p. 264).

[1] On these remedies v. Demelius, *Die Exhibitionspflicht* (1872), pp. 244-50.

Under the old civil law the father's absolute power was not confined to the person of the child, but extended equally to his property. The effect of the patria potestas, indeed, was a partial destruction of the proprietary capacity of the filiusfamilias. A filiusfamilias was incapable of having any rights of property of his own. His was a case of what is called 'involuntary representation' (supra, pp. 177, 223): whatever the filiusfamilias acquired passed, by the necessary operation of law, to the paterfamilias. It was only in the course of its development during the Empire that Roman law broke through, one by one, the rigorous limitations of the early law and gradually established the principle of the active proprietary capacity of filiifamilias.

Proprietary capacity was first conceded to the filiusfamilias *miles* in respect of his so-called peculium castrense. Whatever a filiusfamilias acquired in his capacity of soldier (including e. g. presents given to him by relatives or comrades), he acquired, not for his father, but for himself. The peculium castrense was the property of the son, who could accordingly deal with it as he chose. He might dispose of it, either in his lifetime or by will, in the same way as a paterfamilias. It was only where the son died intestate that the father was able, according to the law of the Corpus juris —which, however, was altered in this respect by the 118th Novel (v. infra, p. 539)—to claim the peculium castrense for himself, not however as heres, but jure peculii, just as though it had been his (the father's) property all the time.

The privileged position of the filiusfamilias miles in respect of his peculium castrense was established at a comparatively early date, viz. by Augustus. In the later Empire, after the reign of Diocletian, when the State had assumed the form of a bureaucratic monarchy, a filiusfamilias who held a public office was placed on a par with the filiusfamilias miles. Whatever he acquired in a public capacity as a civil servant, or an advocate, or a clergyman, was his peculium quasi castrense, and as such was governed by the same rules as applied to the peculium castrense of the filiusfamilias miles.

The tendency of the legislation of the Emperor Constantine and his successors was to enlarge the proprietary capacity of the filiusfamilias and to allow him, on principle, to acquire any property whatever as his own. He was thus given, in the first instance, the

right to hold 'bona materna' as his own, i.e. any property inherited by him from his mother. Afterwards he was given the same right in respect of the so-called bona materni generis, and finally in respect of any sort of property acquired by him from a third party. All such property was comprehended under the general name of 'bona adventicia'. Whatever was acquired otherwise than ex re patris, or as a peculium castrense or quasi castrense, was regarded as adventicium. And the ownership of adventicia vested, not in the father, but in the filiusfamilias. The father however retained, as a remnant of his former rights, the usufruct and management of the bona adventicia. The powers of the filiusfamilias in respect of such property were therefore less complete than his powers in respect of bona castrensia or quasi castrensia. His inability to dispose of it inter vivos carried with it an inability to dispose of it by will. Not even with the assent of his father could the filiusfamilias validly dispose of bona adventicia by will. The term 'bona adventicia irregularia' was applied to adventicia over which the son had a right of management (though he could not dispose of them after his death) and also a right of user. Examples of bona adventicia irregularia would occur, if the person from whom the son acquired the property expressly excluded the father's usufruct and control, or if the son acquired property contrary to the wish of his father.

Thus the only incapacity that continued to attach to a filiusfamilias in the law of Justinian was his incapacity to acquire property 'ex re patris', i.e. from his own father. Whatever a father gave to his son—even though it were a peculium profecticium, or property over which the son was allowed full powers of disposition—remained in the ownership of the father. The son, however, was competent to deal with the peculium he had received and to bind his father by his contracts to the extent of such peculium (supra, p. 430). The peculium profecticium was a peculium of the old type: it illustrated the proprietary incapacity to which the filiusfamilias had formerly been subject and the slave-like position he had occupied. Conversely, the peculium castrense and quasi castrense and the bona adventicia were peculia of the new type: what they illustrated was not the ancient incapacity of the filiusfamilias, but rather the active proprietary capacity which the new law had gradually conferred upon him.

L. 11 D. de castr. pec. (49, 17) (MACER): Castrense peculium est quod a parentibus vel cognatis in militia agenti donatum est, vel quod ipse filiusfamilias in militia adquisivit, quod, nisi militaret, adquisiturus non fuisset. Nam quod erat et sine militia adquisiturus, id peculium ejus castrense non est.

L. 2 D. de SC. Maced. (14, 6) (ULPIAN.): . . . cum filiifamilias in castrensi peculio vice patrumfamiliarum fungantur.

§ 102. *The Extinction of Patria Potestas.*

Patria potestas was extinguished in certain cases in the interests of the child who was subject to it: under the old law, when the child became a flamen Dialis or virgo Vestalis; under Justinian's law, when he attained to the dignity of a bishop or patricius. It was extinguished as a punishment for the father, if he exposed his child or prostituted his daughter. The death of the father only operated to free those who were subject to his immediate power; grandchildren by his son passed, on the death of their grandfather, under the power of their own father. Capitis deminutio media and maxima had the same effect as death (pp. 179, 180).

The juristic act through which patria potestas was extinguished was emancipation. The father sold his son thrice into mancipium; after each sale the fictitious vendee manumitted the son by a manumissio vindicta, i. e. by means of an in jure cessio (supra, p. 167). The two manumissions which followed the first and the second mancipatio respectively operated by virtue of the statute to make the son revert each time into the power of his father. The third manumission, the effect of which was to free the son (supra, p. 58), was the act of emancipation. Hence it was usual for the fictitious vendee to remancipate the son to the father after the third mancipatio, in order that the manumission which effected the emancipation might be performed by the father himself as parens manumissor. In the case of a daughter or grandchild a single mancipatio was sufficient. This mancipatio was immediately followed (after the intervening remancipatio) by the act of manumission which effected the emancipation. The law of the later Empire introduced other and simpler forms of emancipation, viz. emancipation per rescriptum principis (the so-called emancipatio Anastasiana), and emancipation by entry on the judicial records (the so-called emancipatio Justiniana).

The child was no party to the act of emancipation. His consent was not required. Nevertheless, if he protested, the emancipation was void, according to Justinian's law, except where it dissolved a mere adoptive relationship. Apart from the case of an impubes arrogatus (who could, in certain circumstances, insist upon being emancipated), a child in power was never entitled to demand an emancipation as a matter of right. Even when the child was grown up and held offices of dignity,[1] he remained legally in the power of his father so long as the latter did not, of his own free will, dissolve the relationship. The paternal power of Roman law was a power existing entirely in the interests of the father. Its continuance depended accordingly, not on the child's need of protection and educational requirements, but simply on the life of the father. A different view has found expression in modern German law. According to the Common German Pandect law, the paternal power was ipso jure extinguished as soon as the child became practically independent, i. e. as soon as he acquired what was called a 'separata oeconomia'. An emancipation of this kind was known as an 'emancipatio Saxonica'. The German Civil Code goes further still. By virtue of § 1626 of the Code the parental power ceases ipso facto the moment the child attains his majority.

A child who was emancipated underwent capitis deminutio minima, because the effect of the emancipation was to separate him from his previous agnatic relationship (p. 181). The emancipated child was the head of a new family. According to the civil law he had no relations, until he had made a new agnatic relationship for himself by begetting children after the emancipation.

Gaj. Inst. I § 132: Praeterea emancipatione desinunt liberi in potestate parentum esse; sed filius quidem tribus mancipationibus, ceteri vero liberi, sive masculini sexus sive feminini, una mancipatione exeunt de parentum potestate. Lex enim XII tabularum tantum in persona filii de tribus mancipationibus loquitur his verbis: SI PATER FILIUM TER VENUMDUIT, A PATRE FILIUS LIBER ESTO. Eaque res ita agitur: mancipat pater filium alicui, is eum vindicta manumittit. Eo facto revertitur in potestatem patris. Is eum iterum mancipat, vel eidem vel alii: sed in usu est eidem mancipari. Isque eum postea similiter vindicta manumittit. Quo facto cum rursus in potestatem patris fuerit reversus, tertio pater eum

[1] It was only by attaining to certain high dignities (see the beginning of this section) that a child was released from the patria potestas.

mancipat, vel eidem vel alii: sed hoc in usu est ut eidem mancipetur: eaque mancipatione desinit in potestate patris esse.

§§ 6. 7 I. h. t. (1, 12): Nostra autem providentia et hoc in melius per constitutionem reformavit, ut, fictione pristina explosa, recta via apud competentes judices vel magistratus parentes intrent et filios suos vel filias vel nepotes vel neptes ac deinceps sua manu demitterent.—Admonendi autem sumus liberum esse arbitrium ei qui filium et ex eo nepotem vel neptem in potestate habebit, filium quidem de potestate dimittere, nepotem vero vel neptem retinere, et ex diverso filium quidem in potestate retinere, nepotem vero vel neptem manumittere, vel omnes sui juris efficere.

L. 3 § 1 D. de capite minutis (4, 5) (PAULUS): Emancipato filio . . . capitis minutio manifesto accidit, cum emancipari nemo possit nisi in imaginariam servilem causam deductus.

III. GUARDIANSHIP.

§ 103. *The Different Kinds of Guardianship.*

The power of a guardian is the form of family power which takes the place of paternal power when there is no one to exercise the latter.

Roman law distinguished two kinds of guardianship: tutela and cura. Tutor and curator were both alike charged with the care of the person as well as the property of the ward. The principle of the distinction, however, lay in the position which they respectively occupied in regard to the ward's property.

The essence of tutela consists in the 'auctoritatis interpositio', i. e. in the assistance which the tutor is required to give in order to enable juristic acts to be concluded. If, namely, the tutor gives his consent immediately at the time of the conclusion of a juristic act, he thereby renders the ward capable of concluding the act *himself*. The principle of tutela is that it supplies a method by which a person whose capacity for juristic acts is imperfect is cured of his defective capacity. Auctoritatis interpositio *may* be accompanied by the right of 'gestio', i. e. by the right to make all such dispositions on behalf of the ward as are necessary for the general management of the property, the right, in other words, to act as the representative of the ward; but such a right is in no way essential to tutela.

Tutela was employed in two cases: first, in the case of impuberes (tutela impuberum); secondly, in the case of women (tutela mulie-

rum). In the former the tutor had, in the latter he had not, the right of gestio.

The essence of cura, on the other hand, consists in the right of gestio, i. e. in the right of the curator to deal with the ward's property in his (the ward's) stead. The purpose of a cura is to exclude a person who is incapable of managing his property from such management. The curator is, at the same time, the guardian and the representative of his ward. There can be no curator without gestio. On the other hand, a curator has no auctoritatis interpositio, i. e. he cannot enable a person of imperfect capacity to conclude juristic acts *himself* in spite of his imperfect capacity.

In Roman law there were three cases of cura: (1) the cura minorum, over persons whose capacity of action was complete; (2) the cura prodigi, over persons whose capacity of action was imperfect; (3) the cura furiosi, over persons who were completely incapacitated from all acts.

If we bear in mind the principles just set out, we shall be able at once to determine the form which guardianship assumed in Roman law in each separate case where it occurred.

I. *Guardianship of Minors.*

In the guardianship of minors Roman law distinguished two stages: (1) the tutela impuberum; (2) the cura minorum.

(1) Tutela Impuberum.

In the tutela impuberum either the tutor acted on behalf of the ward (by virtue of his right of gestio), or the ward himself acted, if no longer infans, with the assistance of the tutor. Such assistance, however, was only required where the effect of the juristic act was to alienate property or to impose a liability; where, on the other hand, the effect of the act was to confer some right or benefit, the impubes infantia major was fully capable of concluding the act himself without the co-operation of the tutor (supra, p. 216).

(2) Cura Minorum.

The lex Plaetoria (about 186 B. C.) allowed a pubes minor xxv annis, who was fatherless, to apply on special grounds to the magistrate (the praetor) for a curator. Afterwards applications for a curator came to be regularly made even without any special grounds. According to Roman law a minor pubes enjoyed complete capacity of action, nor did the fact of his having a curator deprive him of that capacity. The effect of the appointment of a curator,

however, was to take away the minor's capacity of *disposition*: the right to manage the property of the minor passed from the minor to the curator. All transactions by which the minor improved his position were valid at once, just as they had been before the curator was appointed, but the minor could not effectually alienate any property or incur any liability without the assent of his curator, which assent might be given either in praesenti or before or after the transaction in question (cp. supra, p. 218).

pr. I. de auct. tut. (1, 21) v. supra, p. 217.

pr. I. de curat. (1, 23): Masculi quidem puberes et feminae viri potentes usque ad vicesimum quintum annum completum curatores accipiunt: quia licet puberes sint, adhuc tamen hujus aetatis sunt ut negotia sua tueri non possint.

§ 2 eod.: Item inviti adulescentes curatores non accipiunt, praeterquam in litem: curator enim et ad certam causam dari potest.

II. *Tutela Mulierum.*

According to Roman law—right down even to the classical period—every woman, whether minor or adult, who was not in patria potestate or in manu mariti, was, on account of her sex, subjected to the guardianship of a tutor, and was thus incapacitated from effectually binding herself by any transaction and from entering upon any negotium juris civilis (such as mancipatio, in jure cessio, or a will) without the concurrent auctoritatis interpositio of her tutor. The management of the woman's property was in her own hands, for a tutor mulieris had no right of gestio; but wherever the management necessitated transactions of the kind just indicated,[1] the woman could not effectually act, unless her tutor gave his consent in praesenti. As early as the classical period, however, the restraint involved in this rule had sunk to a mere form. The woman had the power to compel her tutor to give his auctoritas, if he refused to give it voluntarily. The only tutor who was not thus compellable, and who therefore enjoyed a genuine power, was the tutor legitimus. But this very tutela legitima (in which the whole institution of the guardianship of women originated) had already been stripped of all practical importance by the abolition of agnatic guardianship which

[1] Since negotia juris civilis were the only juristic acts known to the old civil law, women were, in the early times, necessarily debarred from concluding any juristic act by themselves.

had been effected by a law—the lex Claudia—passed in the early Empire.[2]

The whole system of tutelae mulierum disappeared in the post-classical age.

Ulp. tit. 11 § 1: Tutores constituuntur tam masculis quam feminis; sed masculis quidem impuberibus dumtaxat propter aetatis infirmitatem, feminis autem tam impuberibus quam puberibus, et propter sexus infirmitatem et propter forensium rerum ignorantiam.

Eod. § 25: Pupillorum pupillarumque tutores et negotia gerunt et auctoritatem interponunt, mulierum autem tutores auctoritatem dumtaxat interponunt.

Eod. § 27: Tutoris auctoritas necessaria est mulieribus quidem in his rebus: si lege aut legitimo judicio agant, si se obligent, si civile negotium gerant, si libertae suae permittant in contubernio alieni servi morari, si rem mancipii alienent; pupillis autem hoc amplius etiam in rerum nec mancipii alienatione tutoris auctoritate opus est.

Gaj. Inst. I § 190: Mulieres quae perfectae aetatis sunt ipsae sibi negotia tractant, et in quibusdam causis dicis gratia tutor

[2] Tutela legitima mulierum was the name for three forms of the guardianship of women which were based on the Twelve Tables and their interpretatio. These three forms were (1) the guardianship of agnates (over unmarried female relations), (2) the guardianship of a patronus (over an unmarried liberta), (3) the guardianship of a parens manumissor (over his unmarried emancipated daughter or granddaughter, v. p. 486). The most important of these was the tutela legitima agnatorum, and this was the very one which the lex Claudia abolished. The legal position of a tutor legitimus mulieris was characterized by two rules: (1) he had a right to refuse to give his auctoritas for the purpose of enabling a woman to execute a will, to alienate by mancipatio, or to incur an obligation by negotium civile (praeterquam si magna causa interveniat). But inasmuch as he had no power to prevent the marriage of his ward, the latter could release herself from his guardianship by means of a marriage with manus. This was the origin of the 'coëmtio fiduciae causa', which was carried out simply 'tutelae evitandae causa'. The woman contracted a fictitious marriage by coëmtio with a third party, who was bound by the fiducia, or trust clause, to release her from the marriage by remancipation (p. 475), the effect being that the manumissor became the tutor of the woman, but a tutor who, not being a tutor legitimus (he was called a 'tutor fiduciarius'), had no power to veto her acts. (2) A tutela legitima mulierum could be assigned by in jure cessio to a third party called a 'tutor cessicius'. A tutela cessicia, however, terminated with the death or capitis deminutio, not only of the tutor cessicius, but also of the cedens. This restricted operation of the in jure cessio (by which all that was transferred was, in effect, the management of the guardianship business) confirms the conclusion to which we are led by other facts, viz. that the in jure cessio tutelae belongs to a more advanced period of Roman law in which an absolute assignment of the guardianship itself was considered inadmissible even in the case of a tutela legitima mulieris. Cp. supra, p. 57, n. 7; Karlowa, *Röm. RG.*, vol. ii. p. 299.

interponit auctoritatem suam; saepe etiam invitus auctor fieri a praetore cogitur.

III. *Cura Furiosi.*

The cura furiosi empowered and bound the curator to manage the property of the lunatic on the lunatic's behalf.

IV. *Cura Prodigi.*

The cura prodigi differed from the cura furiosi in that the prodigus, unlike the furiosus, was himself capable of performing any act by which he acquired a right or benefit. The appointment of a curator, however, precluded the prodigus from performing any act which operated to alienate property or to subject him to a liability; any such act, in order to be effectual, had to be concluded either by the curator on behalf of the prodigus or by the prodigus with the approval of the curator.

V. *Special Cases of Curae.*

In special circumstances a curator with limited authority might be appointed, e. g. for persons incapacitated by illness or old age (cura debilium personarum), or for the purpose of assisting an acting tutor.

§ 104. *The Appointment of Guardians.*

I. The Modes in which Guardians are appointed.

(1) *Tutela.*

The office of tutela may devolve on a person in one of three ways: (1) by statute (tutela legitima); (2) by will (tutela testamentaria); (3) by magisterial appointment (tutela dativa).

(*a*) Tutela Legitima (Statutory Guardianship).

The tutela legitima devolved on the nearest heir of the ward who was capable of acting as guardian. According to the civil law, therefore, it devolved on the nearest agnate, and in default of agnates on the nearest gentilis. The reform of the law of inheritance which was carried out under the later Empire involved the necessity of reforming, at the same time, the law of statutory guardianship. In the law of Justinian the statutory guardianship devolves on the nearest *cognate* of the ward who is capable of acting as guardian.

(*b*) Tutela Testamentaria (Testamentary Guardianship).

In many cases the tutela legitima was excluded by the testa-

mentary appointment of a guardian. The right thus to exclude the statutory guardian was involved in the patria potestas, as well as in the manus mariti. The father could appoint a testamentary guardian either by his will or by a codicil confirmed by his will (cp. infra, p. 572). But where he appointed a testamentary guardian by unconfirmed codicil, or appointed a testamentary guardian to an emancipated child, or lastly, where a testamentary guardian was appointed by a third party (e.g. the mother)—in all such cases the appointment required 'confirmatio', i.e. it had to be ratified by the magistrate. In the first two cases however (where the father was the appointor) the confirmatio was a mere form and was granted at once 'sine inquisitione', but in any other case the grant of confirmatio was only made 'ex inquisitione' and was discretionary.

(*c*) Tutela Dativa (Magisterial Guardianship).

In default of both tutor legitimus and tutor testamentarius the magistrate had the right to appoint a guardian. This right was conferred on the praetor urbanus by the lex Atilia, which only applied to the city of Rome and required the praetor to consult the tribunes, or at least of a majority of them. A tutor thus appointed was called a tutor Atilianus. Analogous powers, as regards the provinces, were subsequently conferred on the praeses provinciae by the lex Julia et Titia. At a later time special 'praetores tutelares' were nominated in Rome, and other magistrates (consuls, municipal magistrates) were invested by statute with the power of 'tutoris datio'. The duty of presenting the 'postulatio tutoris'—i.e. of applying to the magistrate for a tutor dativus—rested on the nearest heirs ab intestato of the ward, and more especially on his mother and grandmother. If they failed to perform this duty, they forfeited their rights of intestacy in the event of the ward dying within puberty.

ULP. tit. 11 § 14: Testamento nominatim tutores dati confirmantur lege duodecim tabularum his verbis: UTI LEGASSIT SUPER PECUNIA TUTELAVE SUAE REI, ITA JUS ESTO: qui tutores dativi appellantur.

§ 3 I. de tut. (1, 13): Permissum est itaque parentibus liberis impuberibus, quos in potestate habent, testamento tutores dare. Et hoc in filio filiaque omnimodo procedit, nepotibus tamen neptibusque ita demum parentes possunt testamento tutores dare, si post mortem eorum in patris sui potestatem non sunt recasuri.

(2) *Cura.*

Curatores were, on principle, appointed by the magistrate. Even the cura legitima of the nearest agnates (or gentiles) over a furiosus, and over a prodigus who squandered the property he had inherited ab intestato, required to be expressly conferred by the decree of the praetor.

ULP. tit. 12 § 1: Curatores aut legitimi sunt, id est qui ex lege duodecim tabularum dantur, aut honorarii, id est qui a praetore constituuntur. § 2: Lex duodecim tabularum furiosum, itemque prodigum cui bonis interdictum est, in curatione jubet esse agnatorum. § 3: A praetore constituitur curator quem ipse praetor voluerit libertinis prodigis, itemque ingenuis qui ex testamento parentis heredes facti male dissipant bona: his enim ex lege curator dari non poterat, cum ingenuus quidem non ab intestato, sed ex testamento heres factus sit patri, libertinus autem nullo modo patri heres fieri possit, qui nec patrem habuisse videtur, cum servilis cognatio nulla sit. § 4: Praeterea dat curatorem ei etiam qui nuper pubes factus idonee negotia sua tueri non potest.

II. Qualifications of Guardians.

In order to be able to serve the office of a guardian, a person must have the necessary qualifications. An unqualified person, even though duly appointed (e. g. by a father in his will), was not allowed to act. The following persons were disqualified in Roman law: aliens, women, and persons requiring guardianship themselves. As regards women, however, an exception was made in favour of a widowed mother and grandmother, who might on application obtain leave from the magistrate to act during widowhood as guardians of such of their children as were impuberes.

L. 18 D. de tut. (26, 1) (NERATIUS): Feminae tutores dari non possunt, quia id munus masculorum est, nisi a principe filiorum tutelam specialiter postulent.

§ 13 I. de exc. tut. (1, 25): Minores autem XXV annis olim quidem excusabantur; a nostra autem constitutione prohibentur ad tutelam vel curam aspirare . . . cum erat incivile eos qui alieno auxilio in rebus suis administrandis egere noscuntur et sub aliis reguntur, aliorum tutelam vel curam subire.

III. The Effect on the Guardian of his Appointment to the Office.

The rights and duties of guardianship commenced on principle ipso jure the moment the appointment took place; that is to say, the person on whom the guardianship devolved became guardian at once, without any act on his part, by virtue simply of the devolution. He stood charged, ipso jure, with the guardianship. He was not entitled to decline it. The acceptance of a guardianship was a munus publicum. A person who had become charged with a guardianship could only obtain exemption on the ground of certain 'excusationes' specified by statute, provided he stated his ground of exemption to the magistrate within a prescribed time.

Testamentary guardians alone had an absolute discretion to decline the guardianship. A tutor or curator appointed by the praetor could escape the guardianship by means of a 'potioris nominatio', i. e. by nominating another person on whom the duty of acting was more properly incumbent.

L. 5 § 10 D. de adm. tut. (26, 7) (ULPIAN.): Ex quo innotuit tutori se tutorem esse, scire debet periculum tutelae ad eum pertinere.

L. 1 § 1 eod. (ULPIAN.): Id enim a divo Marco constitutum est, ut qui scit se tutorem datum, nec excusationem, si quam habet, allegat intra tempora praestituta, suo periculo cesset.

pr. I. de exc. tut. (1, 25): Excusantur autem tutores vel curatores variis ex causis. Plerumque autem propter liberos, sive in potestate sint sive emancipati. Si enim tres liberos quis superstites Romae habeat, vel in Italia quattuor, vel in provinciis quinque, a tutela vel cura potest excusari.

§ 105. *The Effect of the Guardianship.*

The effect of the guardianship is, on the one hand, to confer a certain power on the guardian, and on the other hand, to impose certain duties on him.

I. The Power of a Guardian.

The special power of a guardian consists in his authority to act on behalf of the ward. The extent of this power depends upon the extent of the guardian's gestio, i. e. on the extent of his right to manage the property of his ward. Accordingly a tutor as such need not necessarily have the special power of a guardian at all. On the other hand, a curator as such must always have it. A guardian with the right of gestio was primâ facie authorized to

conclude any juristic act on behalf of his ward, and to bind the ward by such act. An exception, however, was made in regard to gifts, and in the year 195 A. D. the oratio divi Severi prohibited the alienation by a guardian of praedia rustica and suburbana belonging to his ward. This prohibition was subsequently extended to alienations of any substantial portions of the property of the ward, alienations forming part of the current business of administration being alone excepted. Apart from this exception, no alienation by a guardian was valid unless sanctioned by a special decree of the State as guardian-in-chief.

One ward might have several guardians, e. g. by appointment under a will, or in consequence of several relations standing in the same degree of proximity. In such cases each single guardian has primâ facie full power to act on behalf of the ward. But the very object of appointing several guardians may be to divide this power by restricting the power of each guardian, say, to a certain branch of business or to a certain locality. Or again, the intention may be to confer the power to act on behalf of the ward on one of the guardians only, in which case the power to be conferred must of course be plenary power. The guardian thus invested with plenary power to act for the ward is called a 'tutor gerens'. The other guardians, who have no such power, are called 'tutores honorarii'. But the absence of gestio, or power to act for the ward, does not deprive a tutor of his right of auctoritatis interpositio. Though a tutor honorarius cannot act in lieu of the ward, he can, by means of his auctoritas, enable the ward to act himself. The auctoritatis interpositio of Roman law does not, as such, either presuppose or involve any power to act in place of the ward.[1]

L. 1 pr. D. de reb. eor. (27, 9) (ULPIAN.): Imperatoris Severi oratione prohibiti sunt tutores et curatores praedia rustica vel suburbana distrahere.

[1] Even therefore where the tutor gerens was only invested with a partial right of gestio, he was nevertheless a tutor honorarius (with the right of auctoritatis interpositio) in respect of all the acts of his ward. But the only effect of auctoritatis interpositio as such was to give formal validity to the act. The right to determine whether an alienation should take place or whether a contract should be concluded at all, was part of the right of gestio. Accordingly the auctoritatis interpositio of a tutor honorarius was not sufficient to render any such alienation or contract legally operative. Cp. Puchta, *Vorlesungen*, § 352.—As to the difference between auctoritas and gestio v. Pernice, *Labeo*, vol. i. p. 184 ff.

L. 22 § 6 C. de adm. tut. (5, 37) (CONSTANTIN.): Jam ergo venditio tutoris nulla sit sine interpositione decreti; exceptis his dumtaxat vestibus quae detritae usu aut corruptae servando servari non poterint. § 7: Animalia quoque supervacua minorum quin veneant non vetamus.

II. The Duties of a Guardian.

As soon as a guardian entered on his guardianship, it became his duty to exercise care in the conduct of all matters appertaining to his office. He was obliged to do everything that was reasonably required, in the interests of the ward, for the purpose not only of preserving, but also of increasing the ward's property, e. g. by making suitable purchases of land, or by putting out money at interest, or by carrying on the business belonging to the ward. The guardian was bound to do all acts of this kind, in order that the interests of the ward might be as effectively attended to as though the ward were himself in a position to undertake the management of his property. A guardian, however, was only answerable for the diligentia quam suis rebus (cp. supra, pp. 369, 413). Since he undertook his office, not voluntarily, but in pursuance of a duty cast on him by law, it was sufficient if, in guardianship matters, he showed the same degree of care as he showed in his own. But if he fell short of this standard, he was liable to the ward in damages. He was, of course, equally liable if he made important dispositions of the ward's property without the sanction of the State as guardian-in-chief (and therefore in excess of his special power), or if he misappropriated the ward's property, or converted it to his own use, and so forth. And with a view to securing wards in their claims for damages against guardians, the latter were bound (except in certain specified cases) [2], when entering on their guardianship, to give security for proper administration (rem pupilli salvam fore) by means of sureties or pledges. Under the law of the later Empire the ward had even a statutory hypothec over the entire estate of his guardian.

On the termination of the guardianship, the guardian was moreover bound to render an account of his administration and to hand over the ward's property to the ward.

[2] A guardian appointed by the ward's father or by a superior magistrate was not required to give such security.

The remedy by which a ward could compel his guardian to perform these duties was the actio tutelae directa, an action in which condemnation, according to Roman law, entailed infamy (supra, p. 184). If there were several guardians, each of them was liable for the whole amount—their obligation was therefore solidary (supra, p. 361)—but where the power to act for the ward was divided, or where the entire power so to act was vested in a single guardian, the liability attached, in the first instance, to the guardian who was empowered to act and was primarily answerable. The liability of the other guardians was merely subsidiary to the liability of the acting guardian; that is, they were only answerable to the extent to which the ward was unable to obtain satisfaction from the guardian primarily liable. In addition to the liability of the guardians, a subsidiary liability also attached to the 'postulatores' ('nominatores'), or persons who proposed the guardian; to the 'affirmatores', or persons who asserted the guardian's fitness for the office in the magisterial inquiry; and lastly to the magistrate himself—though in Roman law only to a magistratus minor, e. g. a municipal magistrate—who failed to exercise proper care in the appointment or supervision of the guardian.

If the guardian converted any part of the ward's property to his own use, the ward's remedy was the actio rationibus distrahendis, an actio in duplum in which the ward claimed both damages and a penalty.

On the other hand, if the ward failed to recoup his guardian for disbursements, the guardian had the actio tutelae contraria.

In the case of a cura, the remedies were the same as in a negotiorum gestio (supra, p. 411).

'Protutor' was the name given to a person who (whether he believed himself a guardian or not) had acted as a guardian without being one, or to a person who, being really a guardian, had acted as one without knowing it. The acts of a protutor gave rise to an actio protutelae directa and an actio protutelae contraria respectively.

L. 1 pr. D. de tut. (27, 3) (Ulpian.): In omnibus quae fecit tutor, cum facere non deberet, item in his quae non fecit, rationem reddet hoc (tutelae) judicio, praestando dolum, culpam, et quantam in suis rebus diligentiam.

§ 106. *Termination of Guardianship.*

Guardianship terminated (apart from the death or capitis deminutio of the guardian or ward), as a rule, ipso jure with the disappearance of the ground which had called it into existence, e. g. with the majority of a ward, or the recovery of a lunatic. The cura prodigi, however, could only be terminated by a magisterial decree cancelling the guardianship on the ground of a return to prudent habits.

The termination of a guardianship might also be due to the removal of the guardian by the State as guardian-in-chief. Where the removal took place on the ground of a so-called excusatio necessaria, i. e. on the ground that the guardian was not fit to discharge his functions, it was a simple removal; where it took place on the ground that the guardian was suspected of misconduct, it was an ignominious removal and one which, in Roman law, entailed infamy, if occasioned by dolus. A removal of the latter kind was called a 'remotio suspecti tutoris'. Any one was entitled to bring the accusatio suspecti tutoris; the duty to bring it rested on the fellow guardian.

A guardianship might, lastly, be terminated by the resignation of the guardian (abdicatio tutelae). The rules as to the resignation of guardianships were not the same in the classical law and in Justinian's law. In the former, a tutor testamentarius might resign his office at will. In the latter, the guardian was required in every case to assign a specific ground (such as poverty or deafness or blindness) for his wish to resign, and the magistrate had to decide as to the sufficiency of the ground assigned.

§ 107. *The State as Guardian-in-Chief.*

The State is guardian-in-chief in the sense that all other guardians are subject to its supervision and control. The beginnings of a system of State control over guardianships are clearly traceable in Roman law. Thus it was the business of the State to require the guardian, when entering on his duties, to give security against maladministration and to make an inventory of the property committed to his charge. In some cases, as we have seen (supra, p. 493), the guardian was appointed by the State; the sanction of

the State was always necessary in order to validate any important alienation of the ward's property (p. 496); and in certain circumstances the State performed the office of removing a guardian or accepting his resignation. The functions of the State as guardian-in-chief were considerably enlarged by the Common German Law, and the judicial department which, in these matters, represented the State (Obervormundschaftsbehörde) became the supreme authority for superintending and controlling the entire management of all guardianships. The German Civil Code has not altered the functions of the State in this respect.

CHAPTER II

THE LAW OF INHERITANCE

§ 108. *Hereditary Succession; its Foundation and Conception.*

THE fundamental idea which lies at the root both of proprietary rights and of proprietary liabilities, or obligations, is the idea of immortality. An owner may die, but his ownership survives him. A debtor may pass away, but his debt remains. In this respect the rights and duties of private law, on the one hand, differ from those of public and family law, on the other hand; for it is a principle of the rights and duties incident to public and family law that they perish with the person to whom they are annexed. There are, it is true, certain relationships of private law—such as a usufruct or a penal liability for a delict—which are inseparable, by their very nature, from a particular person, and which consequently perish with the death of that person. But the fundamental characteristic of a private right and a private liability, as such, is that they can survive their subject and pass to a new subject. Property is not destroyed by the death of the proprietor.

And the reason is this: though the individual may die, the family survives. In the oldest times the family is the sole owner; individual ownership is unknown and common ownership is the only recognized form of ownership. The common ownership of the family developed, in the course of time, into the common ownership of the community, on the one hand, and the private ownership of the individual, on the other. The after-effects which the original conception of family ownership produced on private ownership are clearly visible in the rights assigned to the family in the law of inheritance. The death of the individual does not remove the true owner of the property, because the family continues to exist. The individual holder of the property dies, but his family and, through it, his property survive him.

The title of the relatives of the deceased, and more especially of his own children, to succeed to his property on his death is based on a rule of law, on a legal necessity, on the fact that, prior

to his death, the relatives were co-owners of the property. In the course of time, however, the idea of private ownership was destined to prevail over the traditional conception of family ownership, and the individual was allowed, through the medium of a will, to assert his absolute right of disposition (i. e. his sole ownership) as against the family even after his death. In the earliest times there was only intestate succession. At a later period we find intestate opposed to testamentary succession. Nevertheless the associations of the old family ownership were still clearly traceable. The rights of certain very near relations were so strong that they survived the recognition of individual ownership. It came to be admitted, moreover, that the claims of a man's nearest relations were in a sense also the claims of the community, and that it was a matter of public concern that the nearest relations, who depended for their existence on the deceased, should not be deprived of his property without sufficient cause. The result of the working of these ideas was that, concurrently with the development of testamentary succession, another form of succession came into use, viz. a succession *contrary to the will*, a 'succession by necessity'. In the old law the rules concerning succession by necessity marked the limits within which the interests of the family continued to prevail over the interests of the individual. In the later law, as shaped by legislation, the rules concerning succession by necessity governed the entire field within which the interests of the family were regarded as identical with the interests of the State. Testators were compelled, to some extent, to satisfy the just demands of their nearest relatives. Just as the rules of intestacy give expression to the primeval rights of the family, and the rules of testamentary succession to those of the individual, so the rules as to succession by necessity give expression to the partial coincidence of the interests of the family with the interests of the State.

According to the original idea, which rejects all claims to succession except those of the family, the heir appointed in the will is, so to speak, received into the family by means of a juristic act. For the family represents the force by which, on the death of the individual, the property is saved from perishing, and is thus the source and foundation of the rights of succession and the rules of hereditary devolution.

In Roman jurisprudence hereditary succession takes the form

of *universal succession*. That is to say, the estate of the deceased is preserved in its entirety, with all its rights and liabilities, and passes in its entirety to the heir or heirs. It was this conception of universal succession that enabled the Roman law of inheritance to assert its inherent superiority as a logical system over the German law of inheritance—a superiority which, after the reception of Roman law, caused the German ideas of hereditary succession to be displaced in favour of those derived from Roman law. German law never advanced beyond the somewhat primitive notion of the earliest times, the notion, that is, of a 'singular succession', according to which, on the death of a person, his property is broken up and distributed piecemeal among his heirs. The bolder genius of Roman law, starting, like German law, from singular succession, successfully worked its way to the maturer conception of universal succession. In Roman law the property of a deceased person is not broken up into its separate ingredients, and scattered among his heirs. It remains absolutely one. Each heir takes, on principle, the whole estate. If several heirs enter on the inheritance, and consequently 'concursu partes fiunt', the inheritance is proportionately divided into ideal parts. No heir can succeed to a separate *thing* belonging to the estate of the deceased. Hereditary succession must necessarily be a succession to *an estate*, i. e. to the whole mass of rights and obligations left by a person on his death.

The doctrine of universal succession acquires practical importance in its application to the question of the transmission of liabilities. And it is certain that Roman law, in evolving the conception of universal succession, which was destined to dominate the whole field of the law of inheritance, started from this very question concerning the debts of the deceased. For if, on a man's death, his property is distributed piecemeal, a grave question arises as to what is to happen to his debts. The doctrine of singular succession must endanger the rights of those who have claims against an inheritance. But where the whole mass of rights and obligations passes in its entirety to the heir or heirs, the matter stands very differently. If there is but one heir, he will take the whole estate subject to all its liabilities. If there are several heirs, each heir will take his aliquot share subject to an aliquot share of the debts—provided of course the debts are divisible; otherwise all the heirs will be liable in solidum, each of them being answerable for the whole amount.

Another question, however, remains to be settled. Shall the heir's liability for the debts of the deceased be limited to the amount of the inheritance, or shall it extend to his own property? The principle of singular succession necessarily implies the former alternative. On the other hand, the principle of universal succession, though not necessarily involving the second alternative, nevertheless points to it as a possibility. It is most characteristic of the Roman law of inheritance, that, in elaborating the conception of universal succession, it decided in favour of the second alternative, and adopted the view that the heir must be made answerable for the debts of the deceased, if necessary, with his own property. In other words, the heir was made answerable in the same manner as though he had contracted the debts himself, or, to put it still more plainly, he was made answerable in the same way as though he were the deceased himself.

This rule contains the pith of the Roman conception of universal succession. Hereditary succession, in Roman law, does not mean a succession to separate rights or liabilities—which would be a singular succession—nor does it mean a mere succession to an estate as a whole—which would be a universal succession in the wider sense of the term. It means primarily a succession to a *personality*, i.e. to an individual subject of proprietary rights and liabilities. This is what is meant by universal succession in the technical sense of the law of inheritance. As far as private law is concerned (i.e. as far as any questions of ownership, obligation, and so forth, arise), the heir is treated as though he were the deceased. In his capacity of heir he represents the deceased, whose rights and liabilities are therefore, in an equal measure, his. The heir, as such, is absolutely one with the deceased. In contemplation of private law, therefore, the deceased continues to live in the person of the heir. That is what we mean by saying that in Roman private law a man's private personality—whether as owner or debtor—is immortal. In the luminous reasoning of Roman jurisprudence the idea of the indestructibility of proprietary rights and liabilities (which, as we have seen, has its material basis in the continued existence of the family) is presented to us in the light of a mere logical conclusion flowing naturally from the conception of the immortality of the person.

The antithesis between universal succession—in the full sense of

the term, as developed in the Roman law of inheritance—and singular succession, is thus clearly and fully brought out. In a singular succession, or succession to a single article of property, the same legal relationship passes from one subject to another; in a universal succession, the subject of the legal relationship remains the same. The essence of universal succession is that it is not, strictly speaking, a *succession*, but a *continuation*: the same legal relationship does not attach successively to a series of subjects, but continues to attach to one and the same subject. It is in this sense that universal succession is said to be a succession to a personality, and singular succession a mere succession to a right. The practical difference between the two forms of succession finds expression in the rule that, as a matter of principle, a singular succession only passes rights and not debts, whereas a universal succession (within the meaning of the law of inheritance) passes both rights and debts, and passes the latter in such a way as to constitute them the debts of the heir himself, so that the original debtor (the deceased) appears before the creditors in the person of the heir.

The interests of the creditors of the deceased's estate supplied the guiding principle upon which the development of the Roman law of inheritance proceeded. The interests of the creditors, however, are in truth identical with those of the debtor himself. For the moment it is recognized that the debtor's personality is immortal—and such a recognition is implied in the devolution of his estate—he (the debtor) becomes capable of obtaining *credit*. Personal credit, or credit which is given to a man personally, now becomes possible; for even though the debtor should die, his person will remain, and the continued existence of his personality is thus, for all purposes of private law, secured against the accidents of this life.

All this is implied in the statement that the essence of hereditary succession consists in its being a universal succession, or succession to a personality—a succession, namely, to the personality of the deceased regarded as the subject of proprietary rights and liabilities.

L. 62 D. de R. I. (50, 17) (JULIAN.): Hereditas nihil aliud est quam successio in universum jus quod defunctus habuerit. And, to the same effect, GAJUS in l. 24 D. de V. S. (50, 16).

L. 37 D. de adq. her. (29, 2) (POMPONIUS): Heres in omne jus mortui, non tantum singularum rerum dominium succedit, cum et ea quae in nominibus sint ad heredem transeant.

§ 109. *Delatio and Acquisitio of the Hereditas.*

The offer of an hereditas is called delatio; the vesting of an hereditas is called acquisitio. A person is *nominated* heir by having the hereditas 'offered' (delata) to him; he *becomes* heir by 'acquiring' the hereditas thus offered to him.

I. *Delatio Hereditatis.*

The person to whom the inheritance shall be offered is determined in Roman law in one of three ways. Where a man dies intestate, the delatio hereditatis is governed by a rule of law. Where he dies testate, it is governed by his will. Where there is succession by necessity (supra, p. 502), it is governed by a rule of law overriding the will. Testamentary succession takes precedence over intestate succession, and succession by necessity, in its turn, over testamentary succession. Succession by necessity has not always the effect of making the whole will void; in certain circumstances it may operate concurrently with the will, the estate of the deceased thus devolving partly by virtue of the will, partly by virtue of a rule of law conflicting with the will. On the other hand, testate and intestate succession were, in Roman law, mutually exclusive. If a man made a will, he could not limit its effect to part of his property only and leave the rest to devolve on his heirs ab intestato. Where the testator failed, from the outset, to dispose of his whole estate in favour of the heirs appointed in his will, or where, subsequently to the execution of the will, part of the inheritance lapsed in consequence of some of the heirs disclaiming their share or dying before the inheritance vested—in either case the whole inheritance went to the heirs appointed in the will, and the parts that were undisposed of, or had lapsed, accrued to them in the ratio of their shares in the estate (jus accrescendi). Every institution of an heir was necessarily an institution in respect of the whole estate. The mere intention of the testator—say, that the heir should only take one-fourth—was not in itself sufficient to curtail his right, which could only be limited by the competing claims of co-heirs. The testator was of course at liberty to determine the amount of the shares which each of his heirs should take, but his mere intention, without more, was not enough to confine the right of the heir to a fraction of the estate. For the institution of the

heir was, in this sense too, an institution in *universum* jus defuncti. It is highly probable that this rule is historically associated with the fact that in Rome, as in Greece and in Germany, wills derived their origin from the practice of adoption (infra, p. 542), and adoption, by its very nature, affects the entire estate of the adopter. Hence the rule: Nemo pro parte testatus, pro parte intestatus decedere potest.

L. 151 D. de V. S. (50, 16) (TERENTIUS CLEMENS): Delata hereditas intellegitur quam quis possit adeundo consequi.

L. 39 D. de adq. her. (29, 2) (ULPIAN.): Quamdiu potest ex testamento adiri hereditas, ab intestato non defertur.

L. 7 D. de R. I. (50, 17) (POMPONIUS): Jus nostrum non patitur eundem in paganis et testato et intestato decessisse: earumque rerum naturaliter inter se pugna est, testatus et intestatus.

II. *Acquisitio Hereditatis.*

In Roman law an inheritance was 'acquired' in two different ways, according as the heir was a member of the household of the deceased (heres domesticus), or a stranger to the household (heres extraneus). Where the heir was already in law a member of the household, there was no occasion for him expressly to take possession of the inheritance: the latter devolved on him ipso jure without any act of entry (aditio) on his part. In other words, a heres domesticus was a heres necessarius. Where, on the other hand, the heir stood legally outside the household, he had first to be admitted within the household of the deceased, before he could acquire the inheritance. In this case, therefore, an express act of aditio, an act manifesting an intention to accept the inheritance, was necessary: a heres extraneus was a 'heres voluntarius'.[1]

1. *Heredes domestici.*

There are three classes of heredes domestici:

(*a*) The most important class are the 'sui heredes', i. e. the agnatic descendants of the deceased who are subject to his immediate power. They belong to the household of the deceased by virtue of the patria potestas (it is thus only a *pater*familias that

[1] We find the same antithesis between heredes domestici and heredes extranei in Greek law: v. Leist, *Gräco-italische Rechtsgeschichte*, pp. 72 ff., 80 ff. And there was the same distinction in German law, where the heredes domestici (sui heredes) were represented by the 'Kinder in der Were', i. e. the children who had remained members of the household. Cp. infra, p. 520, n. 6

can have sui heredes), and they belong to his household *immediately* (only children, or grandchildren by predeceased sons, can be sui heredes), so that, on the death of the father, they become his heirs—sui heredes, namely—by the direct operation of law (ab intestato). The estate of the father, or grandfather, vests in them ipso jure, whether the devolution takes place ex testamento or ab intestato. Not only is their consent unnecessary to constitute them heirs, but they even become heirs contrary to their wishes. They are heredes sui *et necessarii*. The influence of the old conception of family ownership is clearly traceable in the rules regulating their succession. The effect of the ancestor's death is merely to vest absolutely a right which, according to the older legal view, was already theirs during his lifetime. Hence an express act of entry on the part of sui heredes is not required: the delatio operates at the same time as an acquisitio of the inheritance. The civil law did not even allow them to refuse the inheritance, because they could not alter the fact that the property of their ancestor already belonged to them as members of his household. The praetor however introduced what was called the 'beneficium abstinendi', i.e. he allowed sui heredes effectively to repudiate an inheritance by simply declaring their intention not to accept it. According to the civil law, indeed, a suus remained heres in spite of any such declaration, but the praetor refused to regard him as heres, and would not allow him to be sued by creditors who had claims against the inheritance. If he, however, 'immiscuit se hereditati'—if, that is, he actually exercised his right of succession—he thereby forfeited the beneficium abstinendi. Thus, by the praetorian law, the sui were given the same option as the heredes extranei, whether they would accept the inheritance, by intermeddling (immiscere), or refuse it, by abstaining (abstinere). To this extent therefore the praetor had set aside the old notion of family ownership.

Sui heredes were, as already observed, those agnatic descendants of the deceased who had been immediately subject to his power; in other words, those descendants who were freed from patria potestas by the death of the ancestor, or who would have been thus freed, if they had been born in the ancestor's lifetime. Persons who were already sui at the time of the execution of the will were called sui simply; 'postumi sui' were persons who became sui after the execution of the will 'agnascendo', i.e. either

by birth or by the fact that the dropping out of their own father placed them under the immediate power of the testator (their paternal grandfather), and thereby converted them into sui heredes of the testator. An uxor in manu was one of the sui heredes of her husband (supra, p. 463), just as persons who became filiifamilias by adoptio (plena) or arrogatio (supra, pp. 479, 481) were sui heredes of the person adopting them. An emancipated child was not a suus heres. A mother could not have sui heredes.

L. 11 D. de lib. et post. (28, 2) (PAULUS): In suis heredibus evidentius apparet continuationem dominii eo rem perducere, ut nulla videatur hereditas fuisse, quasi olim hi domini essent qui etiam vivo patre quodammodo domini existimantur: unde etiam filiusfamilias appellatur sicut paterfamilias, sola nota hac adjecta per quam distinguitur genitor ab eo qui genitus sit. Itaque post mortem patris non hereditatem percipere videntur, sed magis liberam bonorum administrationem consequuntur. Hac ex causa, licet non sint heredes instituti, domini sunt, nec obstat quod licet eos exheredare, quos et occidere licebat.

(*b*) Grandchildren of the deceased paterfamilias by a surviving son who was in his father's power at the time of the latter's death, are not indeed sui heredes, but they are heredes domestici, because they were likewise—though only mediately—subject to the patria potestas of the deceased and accordingly belonged to his household. Hence, like the sui, they are heredes necessarii of their grandfather. They do not succeed their grandfather ab intestato, because their father (the filiusfamilias of the deceased) excludes them. But if such a grandchild is instituted heir in the will of his grandfather, he is a heres necessarius, and through him, as heres necessarius, the inheritance of the grandfather is ipso jure acquired—by virtue of the patria potestas (p. 177)—for his (the grandchild's) father.[2]

[2] L. 6 § 5 D. de adq. her. (29, 2): si nepos ex filio exheredato heres sit institutus, patrem suum sine aditione faciet heredem et quidem necessarium. It is clear therefore that *all* agnatic descendants are heredes necessarii, because their common patria potestas makes them all heredes domestici, i. e. heirs belonging to the household of the deceased, and, in that sense, 'sui.' The term sui, in the narrower sense, in which it includes only such domestici as were under the *immediate* power of the deceased, is intended for purposes of intestate succession, and indicates those who, owing to the absence of any nearer descendants between them and the intestate, are not only sui, but sui *heredes* (viz. on intestacy). No question arises as to grandchildren by a daughter, because they pass under the patria potestas of their father or paternal grandfather. In relation to their maternal grandfather they are not agnatic, but merely cognatic descendants.

(*c*) In Roman law a testator may institute his own slave heir, manumitting him by the will at the same time. The slave then becomes free testamento (p. 168), and acquires, at the same moment, the inheritance of his master by the necessary operation of law (ipso jure). A slave thus instituted is included among the heredes domestici, because he belongs to his master and his master's household by virtue of the dominica potestas. That is the reason why he is a heres necessarius, but a heres necessarius who (as distinguished from heredes sui et necessarii) has no beneficium abstinendi. If the master's estate is insolvent, the slave is compelled to submit to bankruptcy proceedings and to bear all the consequences of the bankruptcy in his own person. He is however only liable to the extent of the estate, and not in respect of other after-acquired property.

The institution of a servus alienus, on the other hand, operates as a delatio of the inheritance to the master of the slave instituted. The master may direct his slave to accept or not, as he pleases.

2. *Heredes extranei.*

All heredes other than heredes domestici are heredes extranei. The delatio of an inheritance to a heres extraneus does not constitute him heir ipso jure. In order that the inheritance may vest, an act of entry (aditio hereditatis), in other words, the manifestation of an intention to accept the inheritance, is necessary. Hence the description of such heirs as heredes 'voluntarii'.[3] The entry may

[3] According to the old law the power to enter on an inheritance implied, not indeed a power to decline the inheritance (p. 523), but a power to assign it. A heres legitimus (i.e. a person succeeding ab intestato by virtue of the Twelve Tables) might, in so far as he was a heres voluntarius—i.e. if he was an agnatus proximus or a gentilis (infra, p. 530)—assign the inheritance (*ante* aditam hereditatem, of course) instead of accepting it himself. Such an assignment could be accomplished by an in jure cessio (the assignee raising a fictitious vindicatio hereditatis), and its effect was to make the assignee heir; GAJ. ii. § 35: proinde fit heres is cui in jure cesserit, ac si ipse per legem ad hereditatem vocatus esset. The result of the transaction, then, was a transfer of the heirship itself. An in jure cessio of this kind supplied some compensation for the absence of a 'successio graduum' which was peculiar to the civil law of intestacy (infra, p. 530). On the other hand, the effect of an in jure cessio hereditatis *post* aditam hereditatem—which was open to any voluntary heir, including therefore a testamentary heir—was merely to transfer the property comprised in the inheritance; it did not alter the devolution or the heirship. The assignee became owner of the things contained in the inheritance, but the assignor remained the heir, and consequently remained answerable for the debts. The obligatory rights (nomina) were destroyed: the assignee was unable to enforce them,

be explicit or tacit. In the classical law, any act showing an actual intention to accept the inheritance (pro herede gestio) is sufficient to constitute a valid aditio. A formal entry (cretio) is only necessary, in the classical law, if the testator expressly makes it a condition of the institution of the heir. In requiring a cretio, the testator, at the same time, prescribed the period (usually centum dies utiles) within which it was to be carried out. An heir who was instituted cum cretione had to enter with certain formal words: Quod me Maevius heredem instituit, eam hereditatem adeo cernoque. In the absence of an express limitation, there was no civil law rule, in the classical age, binding the heir to accept within a definite term. The creditors of the deceased, however, could require the institutus, by means of an 'interrogatio in jure' (scil. 'an heres sit'), to declare whether he intended to accept or not. The institutus would then apply to the praetor for time, and the praetor would, if he saw fit, allow him the 'tempus ad deliberandum' within which to decide.[4]

The disclaimer of an inheritance which has become delata is called 'repudiatio'. In the older law repudiatio was unknown (infra, pp. 523, 524). In the classical law an inheritance was effectually repudiated by any act showing a clear intention not to accept it. A repudiatio hereditatis, like an aditio, was irrevocable. If, however, a testator by his will required a cretio, a repudiatio was invalid, even in the classical law—the heir, that is, could carry out the cretio notwithstanding a prior repudiatio on his part—and the only way in which the heir could lose the inheritance was by failing to perform the cretio within the prescribed period. Cretio having been abolished by an enactment of Arcadius and Theodosius,

because they did not admit of in jure cessio; the assignor was also precluded from enforcing them, because, having been defeated (though indeed only by a fiction) in the action as to the heirship, he was, on his own confession, not the heir, and consequently not entitled to sue as creditor in respect of the nomina of the deceased.

[4] An interrogatio in jure was an interrogatory which the magistrate (the praetor), in the exercise of his judicial discretion, permitted to be administered in his presence (in jure) to an intended defendant, for the purpose of obtaining from the latter a binding declaration on the question whether, in his case, the necessary conditions for making him a party to the action were forthcoming. Such interrogatories were e. g. 'an heres sit', or 'quota ex parte heres sit', or 'an in potestate habeat eum cujus nomine noxali judicio agitur'. The time applied for by the person interrogated within which to answer an interrogatio in jure was called 'tempus ad deliberandum'.

the rules on the subject ceased to have any practical importance in Justinian's law.[5]

Ulp. tit. 22 § 25: Extraneus heres, siquidem cum cretione sit heres institutus, cernendo fit heres; si vero sine cretione, pro herede gerendo. § 26: Pro herede gerit qui rebus hereditariis tamquam dominus utitur; velut qui auctionem rerum hereditariarum facit aut servis hereditariis cibaria dat. § 27: Cretio est certorum dierum spatium quod datur instituto heredi ad deliberandum utrum expediat ei adire hereditatem nec ne, velut: TITIUS HERES ESTO CERNITOQUE IN DIEBUS CENTUM PROXIMIS QUIBUS SCIERIS POTERISQUE. NISI ITA CREVERIS, EXHERES ESTO. § 28: Cernere est verba cretionis dicere ad hunc modum: QUOD ME MAEVIUS HEREDEM INSTITUIT, EAM HEREDITATEM ADEO CERNOQUE.

Eod. § 31: Cretio aut vulgaris dicitur aut continua. Vulgaris, in qua adjiciuntur haec verba: QUIBUS SCIERIS POTERISQUE; continua, in qua non adjiciuntur. § 32: Ei qui vulgarem cretionem habet, dies illi tantum computantur quibus scivit se heredem institutum esse et potuit cernere. Ei vero qui continuam habet cretionem, etiam illi dies computantur quibus ignoravit se heredem institutum, aut scivit quidem, sed non potuit cernere.

Gaj. Inst. II § 168: Sicut autem qui cum cretione heres institutus est, nisi creverit hereditatem, non fit heres, ita non aliter excluditur quam si non creverit intra id tempus quo cretio finita est; itaque licet ante diem cretionis constituerit hereditatem non adire, tamen paenitentia actus, superante die cretionis, cernendo heres esse potest. § 169: At is qui sine cretione heres institutus est, quive ab intestato per legem vocatur, sicut voluntate nuda heres fit, ita et contraria destinatione statim ab hereditate repellitur.

L. 17 C. de jure delib. (6, 30) (Arcad., Honor. et Theod.): Cretionum scrupulosam sollemnitatem hac lege penitus amputari decernimus.

III. *Hereditas jacens.*

Hereditas jacens is the term applied to an inheritance which has not yet vested, an inheritance, that is to say, which has been 'delata' to a heres extraneus (i. e. voluntarius), but has not yet been acquired by him. An hereditas jacens consists of rights and liabilities. It may even acquire new rights and incur new liabilities. It may acquire new rights, for instance, by the separation of fruits, by the juristic acts of slaves, by the completion of a usucapio. It may incur new liabilities, for instance, by reason of the negotiorum gestio of another acting on behalf of the estate (supra, p. 411), or by reason of the delict of a slave belonging to the estate (supra, p. 425).

[5] As to the original nature of cretio v. infra, p. 521.

As soon as the inheritance is entered upon and is thereby completely vested, the title of the heir dates back to the moment of the death of the deceased. This rule contains the answer to a question which, at first sight, seems to present great difficulty, the question namely as to the subject of the rights and liabilities belonging to an hereditas jacens. The view which is most generally accepted makes the hereditas jacens its own subject. It is said to be a juristic person, and is compared, in this respect, to a foundation (supra, p. 195). Another theory represents an hereditas jacens as not having any subject at all. The rights and liabilities which constitute an hereditas jacens are not, on this view, annexed to any person whatever. Neither of these theories seems satisfactory. According to the former, the heirship would devolve on the deceased's own estate, and this estate would therefore be the *person* succeeding in locum defuncti. The second view disregards the fact that every right or liability is, in its very essence, a legal relationship and, as such, necessarily demands a subject to which the legal relationship shall be attached; the fact (in other words) that the terms 'to be entitled', or 'to be liable', can have no meaning, unless they are predicated of a subject to which the right or liability appertains. The answer which the positive law of Rome gave to the question is contained in the rule concerning the retroactive effect of the vesting of the inheritance. *The heir* is the subject of the hereditas jacens, and the rule referred to means that the acceptance of the inheritance operates to constitute the heir retrospectively the subject of all the rights and liabilities of the deceased as from the moment of his death. The deceased is succeeded on his death directly and without break by his heir, even though the latter may not acquire the heirship till long afterwards. He is never succeeded by his own inheritance. There is no uncertainty, prior to the vesting of the inheritance, as to the *existence* of a subject of the inheritance. The heir is the subject at once, and if no one is willing to take the inheritance, the fiscus will enter upon the bona vacantia 'loco heredis'. The only uncertainty is as to who the subject is. In other words, we have here an instance of a legal relationship in a state of pendency: the legal relationship exists, and the subject exists, but it happens to be objectively impossible, at the present moment, to specify who that subject is. Hereditas jacens is the very type and model of a pendent legal relationship. It will

perhaps be argued, however, that this theory is clearly contradicted by the Corpus juris. For does not Ulpian say: hereditas *non heredis personam*, sed defuncti sustinet? And we venture to think that to this very passage is attributable the fact that, hitherto, writers on this question have shrunk from seeking a solution of the difficulty on the lines just indicated. We maintain, however, that Ulpian's statement coincides with the position we have been endeavouring to establish. In so far namely as the heir is heir, he is, so to speak, not himself, but the deceased. Consequently, the heir *quâ* subject of the inheritance represents not himself, but the persona defuncti. And what is true of the heir is—prior to the vesting of the inheritance—predicated of the inheritance itself (the hereditas jacens), because the hereditas already contains potentially the heir, though he cannot, as yet, be named. The hereditas, like the heres, has the attribute of representing the deceased. The hereditas is the heir who, at some future date, will enter, and for that very reason it represents, not the personality of the heir himself—non heredis personam—but the personality of the deceased, because the heir *quâ* heir *is* the deceased. Thus the passage just cited gives unequivocal expression to the idea which lies at the very root of the Roman law of inheritance, the idea, namely, that an heir as such—and consequently also an inheritance prior to its acceptance by the heir—represents the personality of the deceased regarded as a subject of proprietary rights and liabilities. The hereditas contains implicitly the heir who has not yet entered. Hence we find Pomponius stating, in so many words, that the hereditas 'personam *heredis* interim sustinet'. So far from being mutually contradictory, the two statements that the hereditas represents the persona heredis and also the persona defuncti are rather mutually identical.

L. 24 D. de novat. (46, 2) (Pomponius): Morte promissoris non extinguitur stipulatio, sed transit ad heredem cujus personam interim hereditas sustinet.

L. 34 D. de adq. rer. dom. (41, 1) (Ulpian.): Hereditas enim non heredis personam, sed defuncti sustinet.

L. 22 D. de usurp. (41, 3) (Javolen.): Heres et hereditas, tametsi duas appellationes recipiunt, unius personae tamen vice funguntur.

L. 54 D. de adq. her. (29, 2) (Florentin.): Heres quandoque adeundo hereditatem jam tunc a morte successisse defuncto intellegitur.

L. 22 D. de fidej. (46, 1) (FLORENTIN.): Mortuo reo promittendi et ante aditam hereditatem fidejussor accipi potest, quia hereditas personae vice fungitur, sicut municipium et decuria et societas.

§ 110. *Hereditas and Bonorum Possessio.*

The law of inheritance, like other branches of the law, was dominated by the antithesis between the civil and the praetorian law. The law of inheritance according to the jus civile was called 'hereditas', the law of inheritance according to the jus honorarium was called 'bonorum possessio'. In the law of inheritance, as in other departments of the legal system, the praetorian law became, in the course of its development, the instrument through which the jus gentium was enabled to enlarge the scope and rectify the application of the hard and fast rules of the civil law succession, and thus to pave the way for yet another victory of the principles of the jus gentium over those of the jus civile.

The origin of the praetorian bonorum possessio is veiled in obscurity.

According to one view, the development of bonorum possessio ought to be traced back to the old vindicatio by legis actio sacramento. Where each of two disputants claimed by this mode of procedure to be owner of one and the same thing, the magistrate would, with a view to arriving at a provisional settlement, cancel the status quo ante and regulate the possession anew (vindicias dare) in accordance with his judicial discretion (supra, p. 239). The party to whom the vindiciae were awarded thereby obtained the 'rei possessio', the 'possession of the thing', pending the litigation. Where an hereditatis vindicatio was carried through in the form of a legis actio sacramento—and actions concerning inheritances continued, for a long time, to be brought in this form, because they fell within the jurisdiction of the centumviral court (supra, p. 250) —the necessary result of the 'vindicias dare' was that the praetor awarded to one party the *bonorum possessio*, the possession of the inheritance pending the litigation—presumably on the basis of a provisional inquiry into the substantial justice of the claims of the parties. The award of the bonorum possessio involved a provisional decision by the praetor of the question concerning the right of succession itself, and it may accordingly be assumed that, in many cases, the parties were content to drop further proceedings,

as soon as one of them had secured bonorum possessio from the praetor. This—it is suggested—is probably the manner in which the oldest form of bonorum possessio came into use, the bonorum possessio, namely, which was granted 'in aid of the civil law' (juris civilis adjuvandi gratia). When, in the further course of the development, the praetor began to adopt a more independent attitude towards the civil law, he added to this the oldest form of bonorum possessio a second form, a 'bonorum possessio juris civilis *supplendi* gratia' (the purpose of which was to supply the defects of the civil law scheme of succession), and finally proceeded to assert his absolute magisterial discretion by granting a bonorum possessio in direct opposition to the civil law, a 'bonorum possessio juris civilis *corrigendi* gratia'.

According to another view the germ of bonorum possessio is to be found in the so-called usucapio pro herede. In the early law the usucapio pro herede was a usucapio of the *hereditas*, a usucapio of the inheritance as a whole, including the heirship itself. The usucapiens was regarded as stepping into the place of the heir in respect of the property left by the deceased. Where the hereditas was offered to a heres extraneus, the law required the latter (as we shall see presently) to enter by means of a solemn act of 'cretio'. If he failed to carry out the cretio, and took possession of the inheritance in an informal manner (usus), he did not, under the old law, become heir at once; in order that his possession might ripen into heirship, a usus of one year (in other words, a usucapio) of the hereditas was necessary, an hereditas being reckoned among the ceterae res of the Twelve Tables (supra, p. 319). The principle was exactly the same as in the cases of res mancipi and manus. Where a res mancipi was transferred without the observance of the proper legal forms, a usus of one year (or a biennium) was required in order to convert the transferee's title into full quiritary ownership. Where a marriage was concluded without the observance of the proper legal forms of coëmtio or confarreatio, a usus of one year was required in order to invest the husband with manus. In just the same way, where an hereditas was taken possession of without the observance of the proper legal forms (viz. of cretio), a usus of one year was required in order to convert the possessor into a heres. An hereditas, then, could be acquired either by cretio or by usus.[1]

[1] Cp. Karlowa, *Röm. RG.*, vol. ii. pp. 897, 898.—It is clear therefore that

In this case—as in the other two cases just mentioned—usus (or usucapio) served the purpose for which, in the earlier law, it was primarily designed, the purpose, namely, of providing an alternative to the formal legal modes of acquisition. In order that usus (usucapio) may operate, one thing only is required: the facts must present an exact counterpart of the facts underlying the legal relationship, so that nothing is needed to complete the legal relationship but the addition of the proper legal *form*. Thus in order to acquire a res mancipi by usucapio, the possessor must have obtained it justo titulo; if he obtained it, not in the way an owner, but in the way a thief would have obtained it, usucapio was impossible. Again, in order that a man might acquire manus over a woman by usus, he must have actually lived with her just as though he were her lawful husband. And in the same way a usucapio pro herede was only possible in the case of a person who actually dealt with an inheritance in every respect as if he were the lawful heir. Justus titulus and bona fides, however, were only required in a usucapio of *things*: without them a usus 'pro domino' was impossible, since a man could clearly not stand *de facto* in the relation of owner to a thing he had acquired without justus titulus or bona fides. On the other hand, a man and woman might stand *de facto* in the relation of husband and wife to one another, and, in the same way, the possessor of an inheritance might stand *de facto* in the position of an heir to the estate, quite independently of justus titulus and bona fides. A man had usus 'as a husband', if he in fact enjoyed the rights and performed the duties of a husband in respect of the woman. Just so a person had usus 'as an heir'—'pro herede'—if he in fact enjoyed the rights and performed the duties of an heir, more particularly if he offered the family sacrifices annexed to the inheritance—the 'sacra'—and paid the debts of the deceased. In both these cases the actual facts of the usus reproduced exactly the corresponding legal relationship, because the usus involved not only the exercise of rights, but also the performance of duties. Accordingly manus was acquired by one year's usus as such, and in the same way the heirship was acquired by one year's usus as such. It

at the time of which we are speaking pro herede gestio was not yet recognized as a mode of acquiring an hereditas. A possessor who had entered without cretio did not become heir till he had exercised the rights of an heir for one year.

was quite possible therefore that an hereditas might be acquired usu by a person who had no initial right to it whatever, just as a man who had forcibly abducted his intended wife became her lawful husband in due course by usus.[2] The result of the old civil law rules of succession was often enough that the estate was left without an heir (infra, p. 530). Usucapio pro herede thus came to serve as a supplement to the civil law rules of succession, though its operation as such was somewhat capricious. And it was with a view to regulating so arbitrary a method of acquisition that the praetor—according to this theory—introduced the bonorum possessio, his object being to limit the operation of usucapio pro herede to those persons whom he himself had admitted to the 'possession of the estate', the 'bonorum possessio'. It is not to be denied that this second theory contains a certain amount of truth (cp. infra, p. 525), but it leaves the principal difficulty unsolved.

Perhaps a third view is the true one.[3]

[2] After it had come to be recognized that an inheritance could be acquired not only by cretio, but also by pro herede gestio—in other words, that an informal entry on an inheritance was sufficient in itself to make the person so entering heir—the rule that (in default of a cretio) the heirship could only be acquired by one year's usus pro herede necessarily ceased to have any application. Usucapio pro herede accordingly underwent a change of character, and passed (towards the close of the Republic) from a usucapio of the heirship into a usucapio of separate *things* belonging to the inheritance. Nevertheless the old rules—the rules that neither justus titulus nor bona fides was necessary for a usucapio pro herede and that one year's usus was sufficient even in the case of land comprised in the inheritance—continued to be recognized. The pontifices were interested in the maintenance of the family sacra. If no heir was forthcoming, it was declared that the duty of performing the sacra should devolve on the person who had acquired by usucapio pro herede the largest amount of corporeal things belonging to the estate. But the adoption of the view that pro herede usucapio was a form of usucapio of *things* was fatal to the continued existence of the whole institution. The conditions under which usucapio pro herede operated were now in direct conflict with all the established rules of acquisitive prescription. Accordingly usucapio pro herede came to be regarded as an institution opposed to the general spirit of the law—an 'improba usucapio'—and as such it was abolished by Hadrian (infra, p. 562). —Cp. Klein, *Sachbesitz u. Ersitzung* (1891), pp. 268 ff., 357 ff.

[3] The following exposition is based, in the main, on the admirable researches of Leist, in Glück's *Commentar zu den Pandekten, Serie der Bücher* 37, 38, vol. i. (see also under the title: Leist, *Der römische Erbrechtsbesitz in seiner ursprünglichen Gestalt*, 1870). And on the same subject see Leist, *Gräco-italische Rechtsgeschichte* (1884), pp. 81 ff., 87 ff., where the learned author also refers to the analogies of Greek law. According to Leist, bonorum possessio was originally 'a system by which the magistrate regulated the possession of the inheritance, having regard to the classes of persons entitled to succeed under the civil law', and it was employed, at the same

According to a rule of the early Attic law of inheritance the only person upon whom the estate of a deceased person devolved ipso jure was the legitimate son of the deceased, the suus heres of Attic law. He alone was therefore entitled, without more, to do whatever was necessary for the purpose of maintaining himself in the possession of his father's inheritance, and if a third party had taken possession of the inheritance, he (the son) was entitled to eject the intruder by a mere private act of his own (exagoge, deductio). The suus heres had an indisputable right of succession, and he was ipso jure, not merely heir, but *in possession* of the inheritance. It was different with the other heirs. In order to obtain possession of the inheritance, they had first to apply to the archon for an order of judicial admittance.[4]

There are many circumstances which point to the conclusion that similar principles prevailed in the earliest phase of the Roman law of inheritance. The Twelve Tables contained the following well-known rule:

Si intestato moritur, cui suus heres nec escit, adgnatus proximus *familiam habeto*. Si adgnatus nec escit, gentiles *familiam habento*.

Here we find the name 'heres' only applied to the suus heres, i. e. to the agnatic descendant, the representative—in the strictest sense of the term—of the family of the deceased, the individual in whom the personality of the deceased is both legally and physically perpetuated.[5] The suus heres was owner—though only in theory—

time—though only to a limited extent—for the purpose of enabling those classes to come in *successively*, 'ne bona hereditaria vacua sine domino diutius jacerent' (l. 1 pr. D. de successorio edicto 38, 9).—In the following account of bonorum possessio an attempt has been made to show that the clue to the origin of that institution is to be found in the rule which required a heres extraneus (in whose case, in the words of the edict, 'de hereditate ambigitur') to take possession of the hereditas by means of a formal act.—In Cicero's time the edict on the bonorum possessio ran (according to Leist, vol. i. p. 76) somewhat as follows: SI DE HEREDITATE AMBIGITUR ET TABULAE TESTAMENTI OBSIGNATAE NON MINUS MULTIS SIGNIS QUAM E LEGE OPORTET AD ME PROFERENTUR, SECUNDUM TABULAS TESTAMENTI POTISSIMUM POSSESSIONEM DABO.—SI TABULAE TESTAMENTI NON PROFERENTUR, TUM UTI QUEMQUE POTISSIMUM HEREDEM ESSE OPORTERET, SI IS INTESTATUS MORTUUS ESSET, ITA SECUNDUM EUM POSSESSIONEM DABO.—CUM HEREDITATIS SINE TESTAMENTO AUT SINE LEGE PETETUR POSSESSIO, SI QUA MIHI JUSTA (or, AEQUITATIS) CAUSA VIDEBITUR ESSE, POSSESSIONEM DABO.

[4] See a most instructive treatise by F. Schulin, *Das griechische Testament verglichen mit dem römischen* (being the Rectorial programme, Bâle, 1882), pp. 13, 21; Leist, *Gräco-ital. RG., loc. cit.*

[5] Cp. E. Hölder, *Beiträge z. Gesch. d. röm. Erbrechts* (1881), pp. 21, 120.

of his ancestor's property even prior to the death of his ancestor, and, on the death of the latter, he merely continued to be the owner (supra, p. 508). Accordingly the Twelve Tables do not *make* the suus heres heir. What they do is simply to acknowledge and assume his hereditas. The antithesis in the Twelve Tables lies between the genuine heres, on the one hand, and the proximus agnatus and gentiles on the other. All the Twelve Tables say of the latter is: familiam habento, i. e. they shall have the dead man's *property*. But they shall only have it after doing some act by which they acquire it. The statute avoids directly appointing the proximus agnatus or the gens to the heirship; they are to acquire the heirship, not ipso jure, not by the immediate operation of law, but only by virtue of an act of entry. As in the old Attic law, so in the old Roman law, a suus heres is ipso jure not only heir, but also possessor of the inheritance,[6] and it is this very fact that marks him out as the true heir. The proximus agnatus and the gens, on the other hand, are neither heirs nor possessors of the inheritance ipso jure. The suus heres need not take possession of the estate in order to become heir; the proximus agnatus and the gens can only become heirs by expressly taking possession of the estate. This rule merely states in a different form what is expressed by another rule already adverted to (p. 511), the rule namely that, originally, a heres extraneus (voluntarius)—i.e. an agnate or the gens or any third testamentary heir—could only acquire the heirship and the inheritance by means of a cretio. There can be no doubt that, in the early law, an informal entry upon the inheritance was inoperative;[7] that consequently, at one time, cretio was necessary even in the case of heirs ab intestato and testamentary heirs instituted 'sine cretione';[8]

[6] Hence in his case no act of entry (cretio) was required. The same fact also explains why the existence of a suus heres ipso jure excluded the usucapio pro herede, for a usucapio pro herede could only operate on such of the things left by a man on his death as were legally in the possession of no one; GAJ. ii. § 58, iii. § 201. According to the early law, therefore, where there was a suus heres, the inheritance *had* a possessor ipso jure.

[7] Cp. Voigt, *Jus naturale*, vol. iii. n. 223; Voigt, *Die zwölf Tafeln*, vol. ii. p. 372.—Even the classical Roman jurists treat cretio as the only form of aditio hereditatis; all other acts, including an express, but informal declaration of an intention to accept, merely constitute a pro herede gestio. Cp. e. g. GAJ. ii. § 167; ULP. tit. 22 § 25 (cited supra, p. 512).

[8] Compare also GAJ. ii. § 189, where it is stated that a servus alienus, who was instituted heir in a will, could acquire the inheritance for his master by an informal aditio, if he continued to belong to the same master; but that

and that the force of instituting a testamentary heir 'cum cretione' was not, at the outset, to make his right to succeed conditional on the cretio—for that was a matter of course—but rather to make it conditional on his carrying out the cretio *within a fixed time*.[9] Originally it was only by means of a cretio that a heres voluntarius could effectually enter upon an estate. The cretio had to be carried out in solemn terms ('adeo cernoque', p. 511), before witnesses and in the domicile of the deceased.[10] It constituted the formal 'aditio hereditatis', that is (as the word itself indicates), the formal entry upon the land (the farm) left by the deceased. Cretio was the solemn act by which a heres voluntarius took possession of the hereditas (adeo), and at the same time formally asserted his right to the succession (cerno).[11]

Thus in order that a heres extraneus (i.e. any heres other than a heres domesticus) might acquire an hereditas, it was necessary, both in early Roman law and in early Attic law, that he should first obtain possession. In Attic law possession was obtained by an order of the court; in Roman law by an act which, though extra-judicial, was nevertheless formal in character and was performed in the presence of witnesses. In Attic law the inheritance was acquired by a judicial admittance to possession; in Roman law, by means of a cretio. Causes were, however, at work in the Roman system which were bound, sooner or later, to assimilate Roman law

if he was alienated to another master, he could only acquire it by cretio (jussu novi domini).

[9] Hence even Ulpian (tit. 22 § 27, cited supra, p. 512) defines the cretio clause in a will as 'certorum *dierum spatium*'. If the testator merely directed a cretio, without fixing any time within which it was to be carried out, the direction did not, according to the old law, operate as a condition (in the technical sense) at all, but was simply a re-statement of an existing legal requirement, i. e. a so-called 'condicio juris' (supra, p. 214).

[10] Voigt, *Die zwölf Tafeln*, vol. ii. p. 372, n. 12.

[11] Cerno (which is connected with the Greek κρίνειν) might, in its literal sense, be approximately rendered by 'I judge' (decerno, constituo), scil. that the inheritance belongs to me, or, better, I *adjudge* the inheritance to myself, i. e. I award it to myself by means of my judgement. It is another example of that formal and categorical mode of asserting a right which we find so frequently expressed by the word 'ajo' (e. g. hanc rem meam esse ex jure Quiritium). The 'adeo' is uttered first, because it forms the foundation of the following 'cerno', and 'cerno' is not an idle repetition of 'adeo', but a consequence flowing from it.—The rule that a usucapio pro herede (by a third party) was interrupted by the completion of the cretio was probably, at the outset, regarded as one of the results implied in the vesting of possession which the cretio effected; cp. GAJ. ii. § 55; Voigt, *Die zwölf Tafeln*, vol. ii. p. 378.

in this respect to Attic law, and to introduce a practice under which bonorum possessio could only be obtained with the assistance of the magistrate.

The rule of the early Roman law according to which a suus heres was ipso jure in possession of his father's, or grandfather's, inheritance, rested on the assumption that, in the old Roman law (as in the old Attic law), the title of the suus heres to the succession was beyond dispute, i.e. on the assumption that, in the old Roman law (as in the old Attic law), the mere existence of sui heredes had the effect of absolutely excluding testamentary succession (infra, p. 552). If a suus heres was forthcoming, there could be no doubt that he was the heir. The inheritance accordingly was his without any act on his part; he was ipso jure in possession. On the other hand, where there was no suus heres, the case was one where 'de hereditate ambigitur', i.e. the right of succession might be a matter of controversy and was consequently open to doubt. The heirs ab intestato (agnates, gentiles) might find their title challenged by a testamentary heir, or, conversely, the testamentary heir might find his title challenged by an heir ab intestato (e.g. on the ground that the will was invalid), and so forth. And that was the reason why, in Greek law, every heir other than a suus heres required an order of the court for obtaining possession of an inheritance, the order being granted with certain formalities which supplied an opportunity for inquiring into the title of the claimant. It was for the same reason that, in Rome, the system of bonorum possessio by praetorian decree was developed, the object of the system being, in the first instance, to provide for cases of the kind just mentioned. The praetor declared in his edict: *si de hereditate ambigitur* (i.e. in cases where the right of succession is contested and doubtful, no suus heres being forthcoming), I shall award possession of the inheritance (possessionem dabo) to him who can produce to me a will sealed with the number of seals required by law; failing such a person, I shall award it to the nearest heir ab intestato. The praetor promised the heres *extraneus* (the testamentary heir, and the agnates or gentiles as heirs ab intestato) his assistance in order to enable them to obtain possession of the inheritance.[12] According to the civil law the

[12] Accordingly the class 'unde legitimi' (infra, p. 532) did not originally include the suus heres, but only the proximus agnatus and the gens; cp. Schirmer, *Handbuch des röm. Erbrechts* (1863), § 5, n. 1; § 10, n. 74; § 15, n.

extranei only became heirs by means of a cretio (i.e. by means of a solemn private act), not, as in Athens, by means of a judicial award of possession. But the moment they met with opposition in their attempt to take possession of the estate, a praetorian award became necessary. Without the praetor's assistance they were unable to secure the real bonorum *possessio*, the possession of the inheritance. The suus heres had no occasion for the praetorian bonorum possessio; he was already in possession, and was consequently justified in using force, if necessary, for his own protection. A heres extraneus, however, who was not as yet in possession, was obliged, if opposed, to apply for a judicial order admitting him to the possession. There are good grounds for believing that the rule here stated contains the germ of the whole institution of bonorum possessio, the rule, namely, that, as against a third party in possession, a heres extraneus was debarred from employing force and was compelled to have recourse to an application for a judicial grant of possession. Bonorum possessio, in its oldest form, was a proceeding whereby the magistrate assisted the civil law heres extraneus to obtain possession of the property left by the deceased (infra, note 17); in other words, it was a bonorum possessio juris civilis *adjuvandi* gratia.

At an early stage of its development, however, the praetorian edict adopted another idea of fundamental importance.

Under the old civil law it was competent for a heres extraneus (i.e. voluntarius) to enter on an inheritance or to assign it (supra, p. 510, n. 3), but he had no power to refuse it. That this was the case with the civil heir ab intestato is beyond all doubt. The old civil law recognized neither a successio graduum nor a successio ordinum (infra, p. 530). Even if the inheritance was refused by the proximus agnatus, it did not, according to the civil law, devolve on the remoter agnates or the gens, for a declaration by the proximus agnatus of his intention not to take the inheritance was, legally speaking, inoperative: the hereditas remained 'delata' to him

14. This fact would seem to show beyond all doubt that bonorum possessio was, at the outset, only designed for the benefit of the heres extraneus, there being no occasion for it in the case of a suus heres. When, at a subsequent period, bonorum possessio was extended to the suus heres—whose title as possessor was destroyed by the full development of testamentary power (cp. infra, § 112) and by the praetorian beneficium abstinendi—the words of the edict 'si de hereditate ambigitur' were dropped.

notwithstanding the declaration. And what is undoubtedly true of the heir ab intestato is extremely probable in regard to the testamentary heir. Even in the classical period an heir instituted sub cretione could not annul the delatio of the hereditas by a repudiatio;[13] the only way in which he could annul the delatio was by neglecting to perform the cretio within the time fixed by the testator, and, as far as the early law was concerned, cretio was, as already observed, the general mode prescribed for entering on an inheritance. The legal efficacy of a repudiatio, like the legal efficacy of an informal entry on an inheritance, dates from a subsequent period.[14] Repudiatio was always an informal act, and must, on that ground alone, be assigned to a later stage of the law. An explanation of this refusal to recognize a repudiatio hereditatis may be found in the fact that the early law was incapable of conceiving of any form which should enable an heir, who was not heir till he obtained possession of the inheritance, to get rid of a possession which he had never acquired; in the fact, that is to say, that a counterpart to the cretio seemed inconceivable. If the right of succession could not be acquired by a mere declaration of intention, it could not be lost by a mere declaration of intention. The ancient law of inheritance was characterized by the same spirit of narrowness and formalism that characterized other departments of the law, and the rule of contrarius actus (supra, pp. 434, 435) prevailed.

We should bear in mind, moreover, that, in the early law, no time limit was fixed within which the cretio had to be performed. Thus, if there was a will (without an institution cum cretione, p. 520), and the instituted heir failed to carry out the cretio, the result was not that the inheritance devolved on the heir ab intestato, but that it was left in a state of abeyance. And the same result ensued, if the proximus agnatus failed to carry out the cretio.

We have already pointed out that the serious practical defects of the early civil law of inheritance were to some extent supplied by the institution of usucapio pro herede. Such a usucapio was only applicable to inheritances of which possession had not yet been taken, and its purpose was, on the one hand, to offer an inducement

[13] Gaj. ii. § 168, cited supra, p. 512.

[14] In the old law a man may praetermittere, but he cannot—with legal effect—repudiare hereditatem, i.e. he may omit to accept an inheritance, but he cannot refuse to do so. Cp. Voigt, *Die zwölf Tafeln*, vol. ii. p. 373.

to the person nominated heir not to delay the cretio unduly, and, on the other hand, to afford the relations who were entitled to the succession in default of a cretio an opportunity of acquiring the inheritance. It is obvious, however, that the operation of this method of supplying the defects of the civil law must have been, in a large measure, a matter of mere chance.

It was in these circumstances that the praetor, assuming the rôle of a legislator, intervened to amend the law by means of bonorum possessio. He laid it down as a general principle that, if a person who was nominated heir in a will failed to submit the will to him with a view to obtaining possession of the inheritance, he (the praetor) would grant bonorum possessio to such person as, but for the will, would have been entitled by law to succeed as the next heir ab intestato.[15] And in connexion with this rule he prescribed definite terms—generally 100 days—within which application for bonorum possessio had to be made. A principle of far-reaching importance had thus received the sanction of the law, the principle, namely, that an inheritance could devolve on *successive classes* of heirs. Not that the praetor conferred any power to repudiate an inheritance. What he did was simply to declare that, as soon as the time limited by him for the obtaining of bonorum possessio had elapsed, the right to demand bonorum possessio should pass on to another person who, as far as the civil law was concerned, had no claim to the inheritance at all. The praetor had no power to make a man heir, but he could give him the possession of the deceased man's property, the bonorum possessio. Thus the system according to which the magistrate awarded the possession of the inheritance in cases where the right of succession was doubtful (si de hereditate ambigitur), became the instrument by which the development of the civil law of inheritance was carried on. It was not, in the first instance, the intention of the praetor that the heir to whom he gave possession should retain the inheritance in any event. For, if the testamentary heir subsequently performed the cretio, he thereby became heres and, as such, was in a position to maintain a successful hereditatis petitio even against an heir ab intestato to whom the praetor had given bonorum possessio. The purpose of the praetor was rather to exclude the capricious operation of usucapio pro herede in cases

[15] See the words of the edict: SI TABULAE TESTAMENTI &c., supra, p. 519, n. 3.

where the rules of the civil law left the inheritance vacant, and to establish certain fixed principles for providing a *de facto* heir, who, once he had really obtained possession of the property comprised in the inheritance, should, after the lapse of a year, acquire a civil law title as heir by means of the usucapio pro herede. The object of the praetor's intervention was, in this instance, to supply the defects of the civil law; in other words, to employ the bonorum possessio juris civilis supplendi gratia, and to employ it, at first, in favour only of the civil heir ab intestato as against a testamentary heir who unduly delayed his acceptance. But as early as Cicero's time the edict on bonorum possessio contained a general clause by virtue of which the praetor reserved to himself the power, if he thought fit, to grant bonorum possessio even sine testamento and *sine lege* in accordance with his unfettered discretion. The foundation for the whole subsequent development was thus laid.

Meanwhile the civil law was progressing. Informal modes of entering on an inheritance came to be recognized as valid. It became moreover permissible—at any rate for a testamentary heir instituted sine cretione—effectually to repudiate an inheritance. And when the right of a testator to disinherit a suus heres was definitely acknowledged (infra, p. 552), the force of the rule that a suus heres was ipso jure in possession of the inheritance ceased to be appreciated. A further change was due to the obscuring of the notion that possession of a dead man's property must be acquired by an aditio (cretio) hereditatis, i. e. that in order to become heir, a heres extraneus must first obtain possession of the inheritance. The institution of bonorum possessio, however, which owed its origin to the working of the ideas underlying the old civil law, not only held its ground, but outstripped the civil law by far in the onward course of its development. The praetorian edict evolved, independently of the civil law, a complete system of hereditary succession of its own, and even took upon itself, in certain cases, to maintain this system in opposition to the civil law by means of a bonorum possessio juris civilis *corrigendi* gratia. The praetorian edict owed its strength to the fact that, in this as in other departments of the law, it gave expression and effect to ideas which the older jus civile refused to recognize—the ideas, that is to say, of the new age, the ideas of the jus gentium, among which the idea of cognatic succession was one of the most important.

The practice of awarding the possession of the inheritance—which was originally designed to aid the civil heir in obtaining possession of his ancestor's estate, or rather in obtaining possession of the *things* comprised in his ancestor's estate (v. note 17)—developed into a system of hereditary succession which contained potentially the principles of a complete reform of the civil law.

Thus, in the classical age, two kinds of hereditary succession were recognized: a person might have, first, a right of succession under the civil law (hereditas); secondly, a right of succession under the praetorian law (bonorum possessio).

The praetorian right of succession could never be acquired otherwise than by a judicial act, viz. by a petition (agnitio) addressed to the praetor. The rules concerning pro herede gestio and repudiatio had no application to bonorum possessio. A bonorum possessio which had become delata by virtue of the praetorian edict could only be forfeited in one way: by failure to make the necessary agnitio within the time limited for the purpose. Ascendants and descendants were allowed an annus utilis, all other persons a term of centum dies utiles (quibus scierit poteritque).[16] Since the principles on which bonorum possessio would be granted in all ordinary cases were publicly announced in the edict (bonorum possessio edictalis), applications for bonorum possessio were, at a later time, allowed to be made to the praetor in such cases, not merely at a formal sitting of the court (pro tribunali), but at any place whatever (de plano). The result accordingly was that, as far as the bonorum possessio edictalis was concerned, the proceedings became, in point of fact, extra-judicial, the only remaining requirement being that the application should be addressed to the praetor. On the other hand, wherever the praetor, in the exercise of his free discretion (causa cognita), granted bonorum possessio by means of a special decree (bonorum possessio decretalis) in circumstances not provided for by the edict, there the forms of a judicial sitting were preserved.

The grant of bonorum possessio resulted in the issue of the

[16] There seems to be some connexion between the term of 100 days fixed by the praetor for acquiring an inheritance, and the centum dies within which a caelebs had to marry if he wanted to qualify himself for taking an inheritance: ULP. tit. 17 § 1, cited supra, p 478.—In the same way testators frequently directed the cretio to be performed within a term corresponding to the term prescribed by the praetor: ULP. tit. 22 § 27, cited supra, p. 512.

interdictum quorum bonorum, an interdictum 'adipiscendae possessionis', by the aid of which the bonorum possessor was enabled to obtain possession of the corporeal property left by the deceased.[17] Subsequently, he was given an hereditatis petitio possessoria, which had the same effect as the hereditatis petitio of the civil heir (infra, pp. 562, 563). For the purpose of enforcing the separate rights belonging to the inheritance the bonorum possessor could proceed by an actio ficticia (ficto se herede); and conversely, the creditors of the deceased had an actio ficticia against the bonorum possessor.

The distinction between the three kinds of bonorum possessio, according as it was employed juris civilis adjuvandi or corrigendi or supplendi gratia, was of considerable practical importance. The bonorum possessio juris civilis supplendi gratia was merely a provisional award of the inheritance and was only intended to hold good in case there was either no civil heir at all, or in case the civil heir failed to assert his title. If the civil heir subsequently claimed the inheritance, the bonorum possessor had to give way to him, because the appointment as bonorum possessor was only juris civilis supplendi gratia, i. e. it was only to stand *in default* of a civil heir. In such cases the bonorum possessio was described as being a bonorum possessio 'sine re'. On the other hand, both the bonorum possessio juris civilis adjuvandi gratia and the bonorum possessio juris civilis corrigendi causa were invariably 'cum re', the former, because it was in harmony with the civil law, the latter, because it was upheld by the praetor in opposition to the civil law. Thus the supplemental bonorum possessio only constituted a provisional, while the other two forms of bonorum possessio constituted a definitive grant of the praetorian right of succession. We shall explain hereafter in more detail under what point of view the several cases of bonorum possessio respectively fall.

[17] The effect of the interdictum quorum bonorum was merely to give the grantee possession of the *things* belonging to the inheritance, the corpora hereditaria. The fact that this interdict was for a long time the only legal remedy open to a bonorum possessor as such confirms the view already referred to (supra, p. 523) that the praetorian bonorum possessio was employed in the first instance juris civilis *adjuvandi* gratia, and that its original purpose, therefore, was not to invest the grantee with a distinct praetorian right of succession—to do which it would have been necessary to give him the entire estate left by the deceased, and not merely the corpora hereditaria—but simply to give the civil law heir possession of the corporeal property belonging to the estate. Cp. A. Schmidt, *ZS. d. Sav. St.*, vol. xvii. p. 324 ff.

The delatio of bonorum possessio took place on the same grounds as the delatio of an hereditas. There was a bonorum possessio ab intestato, based on the provisions of the praetorian edict as such; a bonorum possessio secundum tabulas, based on the provisions of a will; and a bonorum possessio contra tabulas, taking effect in opposition to the provisions of a will. At every point within the domain of the law of inheritance the civil law was confronted with the rivalry of the praetor seeking, through the medium of his edict, to satisfy the changing legal convictions of the nation and to bring the civil law of ancient tradition, in its practical application, into harmony with the requirements of successive generations.

pr. I. de bon. poss. (3, 9): Jus bonorum possessionis introductum est a praetore emendandi veteris juris gratia. Nec solum in intestatorum hereditatibus vetus jus eo modo praetor emendavit, . . . sed in eorum quoque qui testamento facto decesserint.

§ 1 eod.: Aliquando tamen neque emendandi neque impugnandi veteris juris, sed magis confirmandi gratia pollicetur bonorum possessionem. Nam illis quoque qui recte facto testamento heredes instituti sunt, dat secundum tabulas bonorum possessionem. Item ab intestato suos heredes et adgnatos ad bonorum possessionem vocat; sed et, remota quoque bonorum possessione, ad eos hereditas pertinet jure civili.

§ 2 eod.: Quos autem praetor solus vocat ad hereditatem, heredes quidem ipso jure non fiunt. Nam praetor heredem facere non potest; per legem enim tantum vel similem juris constitutionem heredes fiunt, veluti per senatusconsultum et constitutiones principales. Sed cum eis praetor dat bonorum possessionem, loco heredum constituuntur et vocantur bonorum possessores.

L. 2 D. de bon. poss. (37, 1) (Ulpian.): In omnibus enim vice heredum bonorum possessores habentur.

Gaj. Inst. IV § 34: Habemus adhuc alterius generis fictiones in quibusdam formulis, veluti cum is qui ex edicto bonorum possessionem petit, ficto se herede agit; cum enim praetorio jure, non legitimo succedat in locum defuncti, non habet directas actiones, et neque id quod defuncti fuit potest intendere SUUM ESSE, neque id quod ei debebatur potest intendere DARI SIBI OPORTERE: itaque ficto se herede intendit, velut hoc modo: JUDEX ESTO. SI AULUS AGERIUS (id est ipse actor) LUCIO TITIO HERES ESSET, TUM SI EUM FUNDUM DE QUO AGITUR EX JURE QUIRITIUM EJUS ESSE OPORTERET; et si debeatur pecunia, praeposita simili fictione heredis ita subjicitur: TUM SI PARERET NUMERIUM NEGIDIUM AULO AGERIO SESTERTIUM X MILIA DARE OPORTERE.

§ 111. *Intestate Succession.*

I. Intestate Succession under the Early Civil Law.

According to the early civil law, as set forth in the Twelve Tables, the following persons were entitled to succeed on an intestacy:

(1) the sui heredes (supra, p. 507 ff.);

(2) the proximus agnatus, i. e. in default of sui heredes, the inheritance devolved on the nearest agnatic collateral;[1]

(3) the gentiles, i. e. in default of agnatic collaterals, the inheritance devolved on the gentiles, or persons belonging to the same clan as the deceased (supra, p. 451). The fact of the gentiles being thus entitled to the succession testified to the influence which the old conception of the common ownership of the gens continued to exercise.[2]

In the second class it was only the *proximus* agnatus, or several agnates within the same degree of proximity, upon whom the inheritance devolved. In the old civil law an inheritance could not be refused (supra, p. 423), and there was consequently no 'successio graduum', no series of successive delationes to the several degrees within the same class. The same rule held good in regard to the different classes inter se. Just as there was no successio graduum, so there was no 'successio ordinum', no series, that is to say, of successive delationes to the several classes of heirs. If there were agnates, the inheritance could not devolve on the gentiles, whether the agnates made use of their delatio or not. A refusal of the inheritance being unknown, the words of the Twelve Tables, taken strictly, only called the agnates to the succession *in default* of sui, and the gentiles *in default* of agnates. According to the old civil law, the delatio of a right of intestate succession could only occur once. If it failed to take effect, the estate might perchance find an heir by usucapio pro herede (supra, pp. 516, 524), or a praetorian heir might acquire it by virtue of a praetorian bonorum possessio. If no one even applied for

[1] As to the nature of agnatio v. supra, p. 449.—According to the interpretation which was put on the lex Voconia (169 B.C.)—an enactment restricting the rights of women to take under wills—the only female agnates who, at a later time, were held entitled to succeed in the second class of heirs ab intestato were the consanguineae, or agnatic sisters, of the deceased.

[2] Cp. Mommsen, *Röm. Staatsrecht*, vol. iii. p. 26; supra, p. 35 ff.

bonorum possessio, the praetor gave the creditors of the deceased possession of the unclaimed estate, in order that they might sell it to a bonorum emtor (supra, p. 288) for the purpose of satisfying their demands.

An emancipatus might have sui, but he could not have agnates. The place of the agnates was taken, in his case, as in the case of a manumitted slave, by his manumissor (supra, p. 486), and the agnatic descendants (the sui) of such manumissor.

XII tab. V 4. 5: Si intestato moritur, cui suus heres nec escit, adgnatus proximus familiam habeto. Si adgnatus nec escit, gentiles familiam habento.

GAJ. Inst. III § 11: Non tamen omnibus simul agnatis dat lex XII tabularum hereditatem, sed his qui tum cum certum est aliquem intestatum decessisse proximo gradu sunt. § 12: Nec in eo jure successio est: ideoque si agnatus proximus hereditatem omiserit, vel antequam adierit decesserit, sequentibus nihil juris ex lege conpetit.

II. Intestate Succession according to the Praetorian Edict.

The praetorian edict divided the relations of a deceased person for purposes of intestate succession into four classes, upon whom the succession devolved in order of priority. There was a bonorum possessio unde liberi, unde legitimi, unde cognati, and unde vir et uxor.

1. Bonorum possessio unde liberi.

The 'liberi' of the praetorian edict included the sui heredes of the civil law and also the emancipati, but only such emancipati as were descendants of the body of the deceased, adoptive children who had been emancipated and a remancipated uxor in manu being accordingly excluded. To this extent the praetor, in dealing with the first class of heirs ab intestato, discarded the agnatic principle of the civil law in favour of the cognatic principle. He did not however adopt the cognatic principle in its entirety. For the praetorian class unde liberi included—besides the sui—only the emancipated natural descendants of the deceased. It did not include children who had been given in adoption, unless indeed the adoptive relationship had been extinguished by emancipation, in which case the child became one of the liberi of his natural father in like manner as though the latter had emancipated him himself. A mother had no liberi, as little as she had sui. So far as the bonorum

possessio unde liberi benefited the sui, it was a bonorum possessio juris civilis adjuvandi gratia; so far as it benefited emancipated children, it was a bonorum possessio juris civilis corrigendi gratia. But the result of the praetorian 'correction' of the civil law in favour of emancipati might be, in certain circumstances, to admit an emancipatus to the succession of his father together with his own children. Such would be the case if the children of the emancipatus, begotten prior to the emancipatio, had remained in the power of their grandfather. The children would then belong to the sui of their grandfather, and the emancipatus himself would belong, together with his children, to the liberi of the praetorian law. Accordingly the praetorian edict (the so-called edictum de conjungendis cum emancipato liberis ejus)[3] provided that, in such an event, the share of the inheritance which the emancipatus would have taken but for his emancipation, should belong, as to one moiety to him, as to the other to his children. By this means the praetor succeeded in adjusting the inequality by which the other brothers and sisters would have suffered, if the emancipatus as well as his children had been allowed to take a full share of the inheritance. A further inequality arose from the fact that sui, being incapable of acquiring property (supra, p. 177), were exclusively confined to their share of the patrimony, whereas the emancipatus was entitled, not only to his share of the patrimony, but also to any after-acquired property. The praetor remedied this injustice by means of a 'collatio bonorum', i. e. he compelled the emancipatus to bring into hotchpot all property acquired by him in the interval between his emancipation and the death of his father, so far as such property would, but for the emancipation, have passed to the father—property in the nature of peculium castrense and quasi castrense being thus exempted. Cp. infra, pp. 564, 565.

2. Bonorum possessio unde legitimi.

In default of liberi, or on the failure of the liberi to make their agnitio within the prescribed annus utilis, the 'legitimi', i.e. the civil law heirs ab intestato, were entitled to ask for bonorum possessio. The legitimi consisted (in the classical law), in the first instance, of the sui again—to the exclusion however of the

[3] This edict was added by Salvius Julianus when he prepared his final consolidation of the edict under Hadrian (supra, p. 85). Hence it is also called the nova clausula Juliani de conjungendis, &c.

emancipati. The sui, as such, had accordingly another annus utilis within which to apply for bonorum possessio. In default of sui, the right to ask for bonorum possessio passed to the proximus agnatus. Where there were neither sui nor agnates, the inheritance, in the older times, devolved on the gentiles—so long, namely, as the mutual connexion between gentiles continued to be legally operative. It is hardly necessary to point out that the bonorum possessio unde legitimi was a bonorum possessio juris civilis adjuvandi gratia.

3. Bonorum possessio unde cognati.

If the second class also failed to apply for bonorum possessio, or if there was no one belonging to the second class, the praetor proceeded to call, in the third place, the cognates down to the sixth degree inclusive, and of the seventh degree a sobrino sobrinave natus. Sobrini were persons who were mutually related as the children of consobrini, i. e. of children of brothers and sisters. A sobrinus is related to the deceased in the sixth degree. By the praetorian law the child of a sobrinus (sobrino natus), who stood in the seventh degree, was entitled to succeed the intestate, although in the converse case the sobrino natus could not have been succeeded by the intestate. As between several cognates, proximity of relationship decided. In the first place, therefore, the praetor called the descendants of the deceased again (for the third time), but in this instance all the issue of the deceased were included, whether they were emancipated or given in adoption or not, and whether they still belonged to their adoptive family or not. In the category unde cognati all ranked equally, emancipatus and suus, capite minutus and filiusfamilias, and natural relationship alone decided. An uxor in manu, who belonged both to the liberi of the first class and the sui of the civil law, did not succeed concurrently with her children in the third class, nor did the children of an emancipatus who had remained in the patria potestas of the deceased (their grandfather) succeed concurrently with the emancipatus himself. For the rule was to call, in the first instance, all the descendants, and no one else but descendants, and to call them in such a way as absolutely to exclude the descendants of descendants in favour of their surviving parent.[4] In this class the children, as such, succeeded not only to

[4] In this class, therefore, the clausula Juliani de conjungendis cum emancipato liberis ejus had no application, since the children who had remained

their father, but also to their mother, and it was in this class too that the mother, as such, came at last to be admitted to the succession of a deceased child (though postponed to the children of the deceased), her right of succession being unaffected by the question whether she were in manu mariti or not. Then followed the cognatic collaterals to the sixth (or seventh) degree, irrespectively of sex [5] and irrespectively of capitis deminutio.

4. Bonorum possessio unde vir et uxor.

In the last place, where there were no relations of any of the preceding classes entitled to the succession, or where such as were entitled did not avail themselves of the bonorum possessio, the succession was granted to the surviving husband or wife, as such, irrespectively of manus.

Both the bonorum possessio unde cognati and the bonorum possessio unde vir et uxor were only granted juris civilis supplendi gratia; that is to say, if civil heirs were forthcoming, who had merely failed to apply for bonorum possessio, both these forms of bonorum possessio were only of a provisional character.

We have already observed that the praetorian law recognized the principle of a successio ordinum. Accordingly, if no member of the class first entitled availed himself of the bonorum possessio within the prescribed interval, the class next in order could apply. And, in the same way, within the limits of the third class, a successio graduum took place: if the nearest cognates, who were called first, failed to apply, the more remote cognates could claim the bonorum possessio. For it was a principle of the praetorian law—and it was in furtherance of this principle that the successio graduum et ordinum (the so-called edictum successorium) was employed—that no inheritance ought, if possible, to be left without an heir.

III. Intestate Succession in the Law of Justinian.

The claims of cognatio to confer rights of intestate succession concurrently with agnatio had already been acknowledged, to some extent, by the praetor in his edict. The history of the imperial legislation on the subject of intestate succession is the history of a slowly progressive development in which the cognatic principle

in the power of their grandfather were excluded by their father, the emancipatus.

[5] Supra, p. 530, n. 1.

asserted itself with ever increasing insistence. The senatusconsultum Tertullianum (under Hadrian) bestowed upon a mother, as such, who, being an ingenua, had the jus trium liberorum, or, being a libertina, the jus quatuor liberorum,[6] a civil law right of succession —a 'legitima hereditas'—to her intestate children. Under this enactment the mother took concurrently with an agnatic sister, though she was excluded by an agnatic brother of the deceased; she was moreover postponed to the liberi and the father, or parens manumissor, of the deceased, but was preferred to the more remote agnates. And conversely, the senatusconsultum Orphitianum (under Marcus Aurelius, 178 A. D.) conferred on children, as such, the first right of succession to their intestate mother. Valentinian II and Theodosius subsequently gave children a further right of intestate succession to their maternal ascendants in preference to the more remote agnates. Thus, through the medium of these two senatusconsulta, the reciprocal relation of mother and children, as such—which the old civil law completely ignored (supra, p. 449)—gained the recognition of the civil law as far as intestate succession was concerned. In other words, the law of succession as between ascendants and descendants underwent a reform in the direction of an acknowledgement of the cognatic principle. The Emperor Anastasius paved the way for a reform, on the same lines, of the law of succession as between brothers and sisters by enacting, in the year 498 A. D., that emancipated (i. e. merely cognatic) brothers and sisters should succeed concurrently with agnatic brothers and sisters, with this restriction, however, that the former should only be allowed to claim one half of the share belonging to an agnatic brother or sister. Justinian placed cognatic brothers and sisters and their children on the same footing as agnatic brothers and sisters, and—by the 84th Novel—gave brothers and sisters of the whole blood, as such, a preference over agnatic brothers and sisters of the half blood.

Even in the Corpus juris, however, we find the two systems of intestate succession—the civil law system of agnatic intestate succession as modified by the legislation of the Empire, on the one hand, and the praetorian system of bonorum possessio ab intestato, on the other—standing side by side in much the same manner as in the older law. The final reform of the law of intestate succession was

[6] Supra, p. 478.

not accomplished by the Corpus juris, but by the 118th Novel, as supplemented by the 127th Novel.

The 118th Novel repealed the pre-existing systems of intestate succession as between relatives and laid down a uniform system of its own. The antithesis between jus civile and jus honorarium was swept away. The victory however remained with the cognatic principle, the principle, that is, to which the jus honorarium had first given effect. According to the 118th Novel the right of succession as between relatives is determined, on principle, by proximity of natural blood-relationship, in other words, by proximity of cognatio. For purposes of intestate succession the 118th Novel divides relations into four classes:

1. The first class consists of the deceased's descendants as such, whether the ancestor were the father or the mother. As between them, the rules of cognatic succession apply.[7] Adoptive children, however, rank equally with natural children (supra, p. 479 ff.), so that an adoptive child has a right to succeed both his natural father—whose real cognatic descendant he is—and his adoptive father.[8] Descendants of the first degree take in equal shares (successio in capita). Descendants of descendants are excluded by their parent, if he survives; but if he has predeceased the intestate, they have what is called a 'right of representation', i.e. they step into his place, and take collectively—by what is known as a 'successio in stirpes'—the share which the parent would have taken, if he had lived.

2. The second class consists of the ascendants, the brothers and sisters of the whole blood, and the children of predeceased brothers and sisters of the whole blood. The members of this class are determined solely by reference to their cognatio, agnatio being disregarded altogether. Among ascendants it is only the nearest who succeed; there is no rule entitling the surviving ascendant of one of the predeceased parents to step into the place of the latter. Accordingly the grandparents on either side only succeed to the inheritance, if both the parents of the intestate have predeceased

[7] We have already explained these rules (supra, p. 533) in dealing with the praetorian class unde cognati. Cp. p. 450.

[8] The recognition of the rights of an adopted child as against his adoptive family represents the last vestige of the old agnatic principle. The idea underlying these rights is that agnatio carries with it, by implication, all the rights of cognatio, cp. p. 450.

them. In such a case—and when there are no brothers and sisters, or children of brothers and sisters, to share the estate—a division 'in lineas' is made between the grandparents[9]: one moiety of the estate goes to the paternal ascendants, the other to the maternal ascendants. Thus, on the one hand, if the paternal grandfather is the sole survivor, he will take one moiety of the inheritance; if, on the other hand, both the maternal grandparents survive, they will only take the other moiety between them.

If however the survivors include, besides ascendants, brothers and sisters of the whole blood, and also children of predeceased brothers and sisters of the whole blood, such brothers and sisters, or their children (as the case may be),[10] succeed concurrently with the ascendants. The shares of the ascendants and the brothers and sisters are then divided in capita, and no distinction is made between the paternal and maternal line of ascendants, each of them being entitled to an equal share. Children of predeceased brothers and sisters of the whole blood step into the place of their predeceased parent by a right of representation, and take collectively (by a successio in stirpes) the share which their parent would have taken, if he had lived.

3. The third class consists of brothers and sisters of the half blood and of children of predeceased brothers and sisters of the half blood. The right of members of this class to succeed is based on the fact of their being *cognatic* half-brothers and half-sisters, so that no distinction is made between consanguinei and uterini (supra, p. 451). Brothers and sisters of the half blood take in equal shares (successio in capita). If any of them have predeceased the intestate, their children step into their place by a right of representation, and take collectively (by a successio in stirpes) the share which their parent would have taken, if he had lived.

4. The fourth class consists of all the remaining collaterals. They succeed according to proximity of degree. The praetorian rule by which the succession of collaterals was restricted to the

[9] Or, if all the grandparents have also predeceased the intestate, the division is made between the still more remote ascendants, if any such survive.

[10] According to the 118th Novel the latter (i. e. the children) only shared the succession with the brothers and sisters, but not with the ascendants. By the 127th Novel, however, they were allowed to take a share concurrently with ascendants as well.

sixth or, in one case (supra, p. 533), to the seventh degree, was abrogated. So far as collateral kinship can be proved at all, it may be urged in support of a claim to succeed, unless of course nearer relations intervene. As between these collaterals, however, there is neither a right of representation—the nearer degree absolutely shutting out the more remote one—nor is there a successio in stirpes, because several collaterals of the same degree invariably take in equal shares (in capita).

As between the several classes, the successio ordinum applies; that is to say, if no one belonging to the first class becomes heir—the persons entitled having either died (prior to aditio) or refused the succession—the estate devolves on the class next entitled. As between the several degrees within each class, the successio graduum applies; that is to say, if no one of the degree first entitled becomes heir, the estate devolves on the persons of the next degree.

The reforms effected by the 118th and 127th Novels only touched the succession of relations. The rules of the praetorian bonorum possessio unde vir et uxor continued to regulate the mutual succession of husband and wife, so that, in Justinian's law, the right of a husband or wife to succeed to his or her spouse remained postponed to that of all his or her relations. They were excluded even by the most remote collateral. Only a widow who was very poor and had no dos, was entitled, in Justinian's law, to certain claims against the estate of her husband, if the latter died in well-to-do circumstances. As against the relations of her husband, she was entitled to one fourth part of the estate, but if there were three or more children, she only took a 'portio virilis', i.e. an equal share with the children. So far, however, as she thereby curtailed the shares of her own children, she did not become owner of her share, but was only entitled to a usufruct of it. The right thus granted to a poor widow was one of which she could not be deprived even by the will of her husband.

The bonorum possessio unde vir et uxor represents, at the same time, the last remnant of the former praetorian rules of intestate succession which survived the law laid down in the 118th Novel. For the rest—as far as intestate succession was concerned—the dual system of hereditas and bonorum possessio had ceased to exist. Its removal was the result of a steady process of development

from within, a development which culminated in the final displacement of the civil law system of succession in favour of the natural system represented by the praetor.

According to the law prior to the 118th Novel, when a filiusfamilias who had remained in the power of his father died, his entire property (including his peculium castrense and quasi castrense) reverted to his father jure peculii, just as though it had been the father's property all the time (supra, p. 484). The 118th Novel, however, provided that the estate of a filiusfamilias should devolve on his death in just the same manner as that of a paterfamilias. Accordingly it went in the first instance to the filiusfamilias' own children. The only difference was that the property which the children of a filiusfamilias took from their father was reckoned as bona adventicia, so that the grandfather, whose patria potestas extended to his grandchildren, had the usufruct and the management of it (supra, p. 485). In this matter too the 118th Novel represents the final consummation of a development extending over several centuries. The filiusfamilias having been declared capable of having heirs, his proprietary capacity was now complete. Thus the final recognition of the principle of cognatic intestate succession coincided with the final recognition of the complete proprietary capacity of the filiusfamilias: in both respects the civil law effects of the old conception of patria potestas had yielded to the views of a different age.

Nov. 118 pr.: Quia igitur omnis generis ab intestato successio tribus cognoscitur gradibus, hoc est ascendentium et descendentium et ex latere, quae in agnatos cognatosque dividitur, primam esse disponimus descendentium.

c. 1: Si quis igitur descendentium fuerit ei qui intestatus moritur, cujuslibet naturae aut gradus, sive ex masculorum genere sive ex feminarum descendens, et sive suae potestatis sive sub potestate sit, omnibus ascendentibus et ex latere cognatis praeponatur.—

c. 2: Si igitur defunctus descendentes quidem non relinquat heredes, pater autem aut mater aut alii parentes ei supersint, omnibus ex latere cognatis hos praeponi sancimus. . . . Si vero cum ascendentibus inveniantur fratres aut sorores ex utrisque parentibus conjuncti defuncto, cum proximis gradu ascendentibus vocabuntur.

c. 3 pr.: Si igitur defunctus neque descendentes neque ascendentes reliquerit, primos ad hereditatem vocamus fratres et sorores

ex eodem patre et ex eadem matre natos, quos etiam cum patribus ad hereditatem vocavimus. His autem non existentibus, in secundo ordine illos fratres ad hereditatem vocamus qui ex uno parente conjuncti sunt defuncto, sive per patrem solum sive per matrem. Si autem defuncto fratres fuerint et alterius fratris aut sororis praemortuorum filii, vocabuntur ad hereditatem isti cum de patre et matre thiis masculis et feminis, et quanticunque fuerint, tantam ex hereditate percipient portionem quantam eorum parens futurus esset accipere, si superstes esset.—

c. 3 § 1: Si vero neque fratres neque filios fratrum, sicut diximus, defunctus reliquerit, omnes deinceps a latere cognatos ad hereditatem vocamus, secundum uniuscujusque gradus praerogativam, ut viciniores gradu ipsi reliquis praeponantur.

c. 4: Nullam vero volumus esse differentiam in quacunque successione aut hereditate inter eos qui ad hereditatem vocantur masculos ac feminas, quos ad hereditatem communiter definivimus vocari, sive per masculi sive per feminae personam defuncto jungebantur; sed in omnibus successionibus agnatorum cognatorumque differentiam vacare praecipimus.

L. un. C. unde vir et uxor (6, 18) (Theodos.): Maritus et uxor ab intestato invicem sibi in solidum pro antiquo jure succedant, quotiens deficit omnis parentum, liberorum, seu propinquorum legitima vel naturalis successio, fisco excluso.

§ 112. *Testamentary Succession.*

A will, in the form ultimately evolved by Roman law, is a unilateral juristic act by which a person institutes an heir and which takes effect as from the death of that person. It is unilateral (supra, p. 205), because it comes into existence solely by virtue of the will of the testator, a declaration of acceptance on the part of the instituted heir being neither necessary nor material. It does not take effect till death, because it is revocable as long as the testator lives. A second will necessarily operates to revoke the first; no one's estate can devolve by virtue of two wills. As between several wills the last one alone has legal validity. The necessary result of the last-made will is to offer the instituted heirs the *entire* inheritance, for 'nemo pro parte testatus, pro parte intestatus decedere potest' (supra, pp. 506, 507). The only persons who, in Roman law, were privileged to make a testamentary disposition of part of their inheritance were soldiers.[1] As regards the contents of a will, the

[1] Thus the rule is expressed more fully as follows: Nemo *ex paganis* pro parte testatus &c. Paganus means a civilian as opposed to a miles.

essential part is the institution of the heir. If no heir is instituted, or if the institution fails in consequence either of the death of the heir, or of a disclaimer on his part, or for any other reason, the whole will is void. No will is valid which does not contain a valid institution of an heir. But in addition to the institution of the heir, a will *may* contain other dispositions designed to take effect on the death of the testator, such as manumissions (supra, p. 168), legacies, appointments of guardians; and the validity of all such dispositions depends on the validity of the institution of the heir.

A person who is qualified to execute a Roman will is said to have 'testamenti factio activa'. No one but a civis Romanus paterfamilias with full capacity for all juristic acts has testamenti factio activa. A filiusfamilias can only dispose by will of his bona castrensia and quasi castrensia, in regard to which he stands in the same position as a paterfamilias. Impuberes, furiosi, and prodigi are not competent to make a will, because they lack capacity of action. A pubes minor, on the other hand, is competent to make a will, because he enjoys complete capacity of action (supra, p. 217). As long as the tutela mulierum was in force, women who were sui juris could only make a will with the auctoritas of their guardian; but the abolition of the tutela mulierum removed this restriction.

To have 'testamenti factio passiva', on the other hand, is to be capable of being instituted heir or of being appointed legatee in a will. Testamenti factio passiva was a necessary incident of the jus commercii, i.e. of proprietary capacity according to the jus civile. In Justinian's law, where the antithesis of jus civile and jus gentium had disappeared, testamenti factio passiva was accordingly a necessary incident of proprietary capacity in general, in a word, of a man's personality as such (supra, p. 161). The only requirement was that the person instituted heir should be in existence at the death of the testator, at any rate as a nasciturus (supra, p. 164). In Justinian's law, the juristic persons of public law, such as the State, the church, or the communities, had testamenti factio passiva, but other juristic persons could only acquire it by special grant from the emperor (cp. p. 188, note 1). The incapacity to take as heirs or legatees which was imposed on certain classes of persons by positive enactments of a penal nature, necessarily involved a forfeiture of testamenti factio passiva (infra, p. 566).

The successive stages through which Roman wills passed in the

course of their historical development will appear from the following exposition.

I. Wills in the Early Civil Law.

The only kind of will originally known to the early civil law was the 'testamentum calatis comitiis'[1a], a will made in the popular assembly. This fact is probably to be explained by the circumstance that the institution of an heir was, at the outset, a modified form of adoption,[2] an adoption, namely, the effect of which was to make the heres institutus the son of the testator, not indeed immediately, but as from the testator's death—provided, of course, the will was not revoked, and the heir complied with the testator's intentions. As in the case of adoptions,[3] so in the case of wills, the co-operation of the popular assembly was required. Soldiers standing in the line of battle were the only persons in whose favour an exception was made, they being permitted to make a valid will informally by a mere verbal communication addressed to their nearest comrade. A will made in this way was called a 'testamentum in procinctu'.

In process of time, however, a form of private testament came into use: the so-called mancipatory will, or testamentum per aes et libram. The testator, in the presence of five witnesses and a libripens, mancipates (i.e. sells) his estate (familia pecuniaque) to a third party, called the 'familiae emtor', with a view to imposing upon the latter, in solemn terms (by a 'nuncupatio'), the duty of carrying out his last wishes as contained and expressed in the tabulae testamenti. The intention is to make the familiae emtor merely the formal owner of the estate. His actual duties consist in carrying out the testator's wishes and handing over the property to the persons named in the tabulae testamenti. The familiae emtor is neither more nor less than the executor of the testator's will. And it is as such that he describes himself in the solemn words of the mancipatio with which he takes possession of the familia pecuniaque

[1a] As to the nature of the comitia calata v. Mommsen, *Röm. Staatsrecht*, vol. iii. p. 39.

[2] See Schulin's treatise referred to above p. 519, n. 4 (especially p. 50 ff.), where the author appears to make out a clear case in support of the above view of the origin of wills. For a different view v. Pernice, *Formelle Gesetze im röm. Recht*, p. 29.

[3] Originally the only available form of adoption was arrogatio. The datio in adoptionem is manifestly of later origin. It presupposes the rule of the Twelve Tables: si pater filium ter venumduit &c. Cp. supra, p. 480.

of the testator: familia pecuniaque tua *endo mandatelam custodelamque meam*, quo tu jure testamentum facere possis secundum legem publicam, hoc aere aeneaque libra esto mihi empta.[4] We have here a case of a qualified mancipatio with a collateral agreement in favour of a third party, viz. the person (or persons) benefited by the will. It is the earliest instance in Roman law of an agreement in favour of a third party. Just as a mancipatio (fiduciae causa, supra, pp. 60, 61) can be utilized for the purpose of effecting a depositum, so it can be utilized for the purpose of effecting a mandatum. And that is what actually happened in the case before us. We have here the oldest form of the Roman contract of mandatum: a juristic act validly concluded, not indeed consensu, but re (viz. by a formal transfer of ownership), and giving rise to a rigorously binding obligation. The mandatum and the transfer of ownership are not mutually incompatible. The familiae emtor is the mandatary of the testator, *because* he is, formally speaking, the owner of the familia. A mancipatory will is akin to a fiducia, because, in the former as in the latter, the ownership transferred is merely formal ownership, and, as such, is made the practical medium for effectuating the purposes specified in the collateral clause. A mancipatory will is not, however, a fiducia, in the technical sense of the term, because, in a fiducia, the duties of the formal owner are left to his 'good faith', and accordingly depend on the circumstances of the case and the discretion which a man of honour would be expected to exercise; whereas the duties of the familiae emtor are accurately defined by the nuncupatio in such a manner as to bind him rigorously to their performance. The mancipatio to the familiae emtor is not made 'fidei fiduciae causa' (with a reference to other collateral agreements); it is made with a nuncupatio, complete in itself, forming part and parcel of the mancipatory act, and placing the precise nature of the duties to be performed beyond all doubt. A fiducia is a mancipatio with an undefined trust-clause, a mancipatory will is a mancipatio with a strictly defined trust-clause. A fiducia, being indefinite, gives rise to an actio bonae fidei (supra, p. 62); a nuncupatio, being precise, gives rise to an

[4] Gaj. iii. § 204. The familiae emtor declared that in acquiring ownership in the familia by means of the mancipatio, he was merely acting on behalf of (i. e. as the agent of) the testator (endo mandatelam), and consequently that he was, substantially, in the position of a trustee of another man's property (endo custodelam meam).

actio stricti juris. The nuncupatio which accompanied the mancipatio accordingly imposed a definite duty on the familiae emtor, and his obligation to perform that duty was fully protected by the rule of the Twelve Tables:

Cum nexum faciet mancipiumque, uti lingua nuncupassit, ita jus esto.[5]

The only effect, indeed, of such an application of mancipatio to the familia of the testator was, in the first instance, to enable the testator to give bequests.[6] It could not enable him to make another person heres, because the familiae emtor himself was formally the sole heres, i. e. the sole owner of the estate. Accordingly the words used by the testator in his nuncupatio were merely as follows: haec ita ut in his tabulis cerisque scripta sunt, *ita do, ita lego, ita testor*[7], itaque vos Quirites testimonium mihi perhibetote. As far as its contents were concerned, the mancipatory will was at first merely a will for giving legacies. It was not till later, when the notion of the familiae emtor's ownership became obliterated, and, still more, when the familiae emtor ceased to be regarded as the agent and executor of the testator and assumed the rôle of a person whose presence was merely required for formal purposes, that the inheritance, so to speak, disencumbered itself of his ownership. Accordingly it became, henceforth, the foremost function of every will to provide the inheritance with an owner (heres), and, at the same time, to provide the creditors with a person who should be answerable to them for the debts of the estate. It had formerly been the duty of the familiae emtor, not only to pay the legacies, but also to pay the debts of the deceased. When, in the course of time, both these duties ceased to be regarded as properly incumbent upon the familiae emtor, the law compelled

[5] Cp. supra, p. 59 ff.

[6] On the limited rôle thus played by the mancipatory will in its original form, v. Schulin, *op. cit.* p. 54 ff. The author, in the same place, lays much stress on the fact that the familiae emtor was merely the 'curator' of the estate, but he appears to assume that such a curatorship was inconsistent with the real nature of mancipatio. We have endeavoured in the text to show that this assumption is unfounded. For the transfer of ownership (which the mancipatio effects) is precisely the medium through which a valid mandatum is constituted. The same thing occurs in the case of a trustee in German law. In the old law mere consensus is not sufficient to constitute a valid mandatum.

[7] Testari means merely 'to declare in the presence of witnesses' (testes), Schulin, *op. cit.* p. 58. Sometimes it even means a mere declaration of intention as such; Kipp, *Die Litisdenuntiation*, p. 62 ff.

the testator to fill the vacancy thus created by instituting an heir. Such was the process by which the Roman will assumed the form in which it was subsequently known in Germany. The mancipatory will of the original type was conceived on the old traditional lines of a mere singular succession on death. The interests of the creditors of the estate (and the interests of the legatees) rendered the testamentary institution of an heir imperative, and it was under the pressure of these interests that a will became, in Roman law, a juristic act the essence of which consisted in its providing, first and foremost, for the appointment of a successor to the personality of the testator; in other words, in its providing for a *universal succession*. It is thus we arrive at the rule which governs the mancipatory wills of the later type: velut caput et fundamentum intellegitur totius testamenti heredis institutio (Gajus II § 229). And to such lengths was this rule carried that, according to the classical law, all testamentary dispositions which preceded the institution of the heir were void.

In the classical law the testamentum calatis comitiis has ceased to exist. The will of the classical civil law is the mancipatory will (per aes et libram).

Gaj. Inst. II § 101: Testamentorum autem genera initio duo fuerunt. Nam aut calatis comitiis testamentum faciebant, quae comitia bis in anno testamentis faciendis destinata erant, aut in procinctu, id est, cum belli causa arma sumebant. Procinctus est enim expeditus et armatus exercitus. Alterum itaque in pace et in otio faciebant, alterum in proelium exituri.

§ 102 eod.: Accessit deinde tertium genus testamenti quod per aes et libram agitur. Qui neque calatis comitiis neque in procinctu testamentum fecerat, is, si subita morte urgebatur, amico familiam suam, id est patrimonium suum, mancipio dabat, eumque rogabat quid cuique post mortem suam dari vellet. Quod testamentum dicitur per aes et libram, scilicet quia per mancipationem peragitur.

§ 103 eod.: Sed illa quidem duo genera testamentorum in desuetudinem abierunt; hoc vero solum, quod per aes et libram fit, in usu retentum est. Sane nunc aliter ordinatur quam olim solebat. Namque olim familiae emptor, id est, qui a testatore familiam accipiebat mancipio, heredis locum optinebat, et ob id ei mandabat testator quid cuique post mortem suam dari vellet. Nunc vero alius heres testamento instituitur, a quo etiam legata relinquuntur, alius dicis gratia propter veteris juris imitationem familiae emptor adhibetur. § 104: Eaque res ita agitur. Qui facit testamentum, adhibitis, sicut in ceteris mancipationibus, V testibus civibus Romanis puberi-

bus et libripende, postquam tabulas testamenti scripserit, mancipat alicui dicis gratia familiam suam. In qua re his verbis familiae emptor utitur: FAMILIA PECUNIAQUE TUA ENDO MANDATELAM CUSTODELAMQUE MEAM, QUO TU JURE TESTAMENTUM FACERE POSSIS SECUNDUM LEGEM PUBLICAM, HOC AERE, et ut quidam adjiciunt, AENEAQUE LIBRA ESTO MIHI EMPTA. Deinde aere percutit libram idque aes dat testatori, velut pretii loco. Deinde testator, tabulas testamenti tenens, ita dicit: HAEC ITA UT IN HIS TABULIS CERISQUE SCRIPTA SUNT, ITA DO, ITA LEGO, ITA TESTOR, ITAQUE VOS QUIRITES TESTIMONIUM MIHI PERHIBETOTE. Et hoc dicitur nuncupatio: nuncupare est enim palam nominare.

II. Wills in the Praetorian Law.

The praetorian law of wills took the mancipatory will of the civil law as its starting-point, but proceeded to develop the will of the civil law into a new form of will. Subsequently to the adoption of mancipatory wills it became a frequent practice for testators to confine their nuncupatio to a solemn declaration that a document exhibited by them contained a record of their last wishes. For the purpose of establishing the identity of this document (tabulae), it was usual for the seven attesting parties who were present—viz. the five witnesses, the libripens, and the familiae emtor (the last two having also shrunk to the position of mere witnesses)[8]—to close the tabulae with their seals. The unbroken seals of the seven witnesses were proof that the document produced was identical, in all respects, with the document which the testator, in the mancipatio familiae, had declared to contain a record of his last will.

It was clear that the tabulae, and the seven seals of the witnesses which served the purpose of closing the tabulae, constituted the essential part of the whole act of testation. The ceremony of mancipatio with aes and libra had dwindled to an empty formality. The praetor realized this fact and acted accordingly. He granted to any person who could produce such a document sealed with seven seals (i. e. an undoubted testamentary instrument) the bonorum possessio secundum tabulas, and granted it even *where the forms of a mancipatio had not been complied with.*

The praetorian law had thus in effect developed a new form of will. The mancipatory will of the civil law wore the form of an agreement, i. e. of a *bilateral* juristic act, which could only be

[8] For a different explanation of the origin of the seven witnesses, see H. Erman, *ZS. d. Sav. St.*, vol. xx. pp. 188, 189.

completely constituted by the co-operation of the familiae emtor and a signification of acceptance on his part. In dispensing with the mancipatio, the praetor, at the same time, rendered the familiae emtor as such and his signification of acceptance superfluous. According to the praetorian law the familiae emtor was now, in form as well as in substance, a mere witness. All that the praetor required was that the testator should, in the presence of seven persons called in as witnesses, declare that the document exhibited by him embodied his testamentary dispositions. It was thus only through the medium of the praetorian law that the execution of a will became a *unilateral* juristic act.

A bonorum possessio secundum tabulas, granted on the strength of a will sealed with the seals of seven witnesses,[9] was a bonorum possessio juris civilis adjuvandi gratia, if the forms of a mancipatio had been observed. But if the forms of a mancipatio had not been observed, a bonorum possessio secundum tabulas was originally only granted by the praetor juris civilis supplendi gratia, i. e. the grant was merely provisional and was only intended to hold good as long as no civil heir ab intestato came forward to claim the inheritance. It was not till a rescript of Antoninus Pius that the bonorum possessor was allowed in such a case to meet the hereditatis petitio of the legitimus heres with an exceptio doli. The effect of the rescript was to convert a bonorum possessio secundum tabulas, when granted in the absence of a mancipatio—and it is probable that by this time the absence of mancipatio was the rule—into a bonorum possessio juris civilis corrigendi gratia. The civil law testament thus underwent a complete reform at the hands of the praetor. A bilateral mancipatory act was finally converted into a unilateral act of testation in the sense in which the term was understood in the later law.

Gaj. Inst. II § 119: Praetor tamen, si septem signis testium signatum sit testamentum, scriptis heredibus secundum tabulas testamenti bonorum possessionem pollicetur; et si nemo sit ad quem ab intestato jure legitimo pertineat hereditas, . . . ita poterunt scripti heredes retinere hereditatem: nam idem juris est et si alia

[9] It was a further requirement that each witness should place his signature next to his seal. This was called 'adscribere' or 'adnotare' (l. 22 § 4, l. 30 D. qui test. 28, 1), at a later period, 'superscriptio.'—As to the earliest form of the edict, cp. supra, p. 518, n. 3, and on the same subject Karlowa, *Röm. RG.*, vol. ii. p. 856.

ex causa testamentum non valeat, velut quod familia non venierit aut nuncupationis verba testator locutus non sit. § 120: Sed videamus an, etiamsi frater aut patruus extent, potiores scriptis heredibus habeantur: rescripto enim imperatoris Antonini significatur eos qui secundum tabulas testamenti non jure factas bonorum possessionem petierint, posse adversus eos qui ab intestato vindicant hereditatem defendere se per exceptionem doli mali.

III. Wills in Justinian's Law.

Following the line of development adopted in the preceding imperial legislation, Justinian's law adhered to the praetorian conception of a will and established the following forms of wills:

1. The ordinary private will is a will executed in the presence of seven qualified witnesses called in for the purpose of attesting it.[10] It may be executed either orally or in writing. An oral will is executed by means of a verbal declaration addressed by the testator to the witnesses and expressing his last wishes. A written will is executed as follows: the testator makes a declaration that a document produced by him and shown to the witnesses is his will; he thereupon puts his signature (subscriptio) to the document and the witnesses put theirs, and finally the witnesses affix their seals and append their names to the seals (v. note 9). In either case there must be a 'unitas actus', i. e. the execution of the will must not be interrupted by any intervening act.

2. In addition to the ordinary form of will, there are, in Justinian's law, certain special forms of wills. The only person who, in Roman law, can make a valid will without any formality whatever is a soldier on active service (testamentum militis). In some cases the formal requirements of the law are relaxed. Thus, during the prevalence of a contagious disease, the witnesses need not all be present at the same time, but may be called in successively to attest the will (testamentum pestis tempore). In the

[10] The capacity to act as a witness to a will is also called 'testamenti factio'. No one has testamenti factio in this sense, unless he has testamenti factio activa, i.e. unless he enjoys full proprietary capacity according to the Roman civil law, and also complete capacity for juristic acts (supra, p. 541). Thus unfree persons, aliens, women, impuberes, furiosi, and prodigi are not competent witnesses. In addition to these, persons who are unfit to act as witnesses by reason of some special defect, such as blindness, deafness, or dumbness, and persons who are not independent in their relations to the testator, are also disqualified. The latter class includes all those who are in the power of the testator, as well as the instituted heir and every one connected by patria potestas with the instituted heir.

country, again, five witnesses are sufficient in an emergency, but, if the will is in writing, they must be informed of its contents (testamentum ruri conditum). In other cases the requirements of the law are more stringent. Thus, when a blind person wishes to execute a will, an eighth witness must be present for the purpose of reading the contents of the testamentary document to the other witnesses, and he must join in signing and sealing the will (testamentum caeci). Public wills are privileged in respect of their *form*: they are validly executed without any further solemnity by the mere delivery of the testamentary document to the emperor (testamentum principi oblatum), or by a mere entry of the testator's dispositions on the records of the court (testamentum apud acta conditum). A will which benefits none but the descendants of the testator—a so-called testamentum parentis inter liberos—is privileged by reason of its *contents*; if it is oral, it may be validly executed in the presence of but two attesting witnesses; if it is in writing, it may be validly executed by means of a memorandum bearing the date of the execution and written in the handwriting of the testator.

§ 1 I. de test. ord. (2, 10): Quod per aes et libram fiebat (testamentum), licet diutius permansit, attamen partim et hoc in usu esse desiit. § 2: Sed praedicta quidem nomina testamentorum ad jus civile referebantur. Postea vero ex edicto praetoris alia forma faciendorum testamentorum introducta est; jure enim honorario nulla emancipatio desiderabatur, sed septem testium signa sufficiebant, cum jure civili signa testium non erant necessaria. § 3: Sed cum paulatim tam ex usu hominum quam ex constitutionum emendationibus coepit in unam consonantiam jus civile et praetorium jungi, constitutum est ut uno eodemque tempore, quod jus civile quodammodo exigebat, septem testibus adhibitis et subscriptione testium, quod ex constitutionibus inventum est, et ex edicto praetoris signacula testamentis imponerentur: ut hoc jus tripertitum esse videatur, ut testes quidem et eorum praesentia uno contextu testamenti celebrandi gratia a jure civili descendant, subscriptiones autem testatoris et testium ex sacrarum constitutionum observatione adhibeantur, signacula autem et numerus testium ex edicto praetoris.

§ 14 eod.: Si quis autem voluerit sine scriptis ordinare jure civili testamentum, septem testibus adhibitis et sua voluntate coram iis nuncupata, sciat hoc perfectissimum testamentum jure civili firmumque constitutum.

3. As regards the contents of a will, the essential part is, as already observed the appointment of the heir. In the law of the

Corpus juris, as also in the later German Pandect law (which remained in force as the common law of Germany till the enactment of the German Civil Code), a will was a unilateral juristic act, operating as from the testator's death, whereby the testator instituted an heir. Besides instituting an heir, the testator might grant legacies and make other provisions (e. g. appoint a guardian for his children, supra, p. 493), but the only essential part was the institution of the heir: without it there could be no will within the meaning either of the Corpus juris or of the former German common law. Cp. supra, p. 541. The testator's intention to institute an heir must be expressed in precise and categorical language. Accordingly the institution of 'incertae personae', as, for example, the poor, is void in Roman law. Persons who cannot be ascertained till after the execution of the will (e. g. quisquis primus ad funus meum venerit, heres esto), and persons not born till after the execution, are likewise personae incertae. The only persons in whose favour an exception to this rule was made were the postumi sui (supra, p. 508), and testators were allowed—though only by slow degrees—both to institute and to disinherit postumi sui in their wills (infra, p. 554). Originally, too, the institution of a juristic person was void, a juristic person being regarded as a persona incerta (supra, p. 188, n. 1). Subsequently, however, *public* juristic persons were granted a general testamenti factio passiva (supra, p. 541), and, in Justinian's law, an institution of personae incertae for charitable purposes (e. g. an institution of the poor or the sick) was regarded as a mode of creating an ecclesiastical institution, or foundation, and, as such, was held to be valid (supra, pp. 197, 198). The instituted heir must be in existence at the time of the testator's death, at any rate as a nasciturus (supra, p. 541).

The institution of an heir must not be made subject to a restriction as to time (dies) nor to a resolutive condition, so far as it is the object of such restriction or condition to limit the effect of the vesting of the inheritance.[11] If, nevertheless, words purporting thus to qualify an institution are inserted, they are deemed unwritten. For the rule of Roman law was, 'semel heres semper heres.' On the other hand a suspensive condition is admissible. What is known as a 'substitution' is a special case of an institution with a suspensive condition. 'Substitution' is the appointment of a

[11] Cp. Eisele, in Jhering's *Jahrbücher*, vol. xxiii. p. 132 ff.

second heir for the event of the first-appointed heir—the heres institutus—not succeeding to the inheritance. The testator is said in such a case 'plures gradus heredum facere'. Impossible and immoral conditions annexed to the institution of an heir are deemed unwritten (cp. supra, p. 214).

ULPIAN. tit. 24 § 15: Ante heredis institutionem legari non potest, quoniam vis et potestas testamenti ab heredis institutione incipit.

Eod. tit. 21: Heres institui recte potest his verbis: TITIUS HERES ESTO, TITIUS HERES SIT, TITIUM HEREDEM ESSE JUBEO. Illa autem institutio: HEREDEM INSTITUO, HEREDEM FACIO, plerisque improbata est.

Eod. tit. 22 § 4: Incerta persona heres institui non potest, velut hoc modo: QUISQUIS PRIMUS AD FUNUS MEUM VENERIT, HERES ESTO: quoniam certum consilium debet esse testantis.

Eod. § 19: Eos qui in utero sunt, si nati sui heredes nobis futuri sint, possumus instituere heredes: si quidem post mortem nostram nascantur, ex jure civili; si vero viventibus nobis, ex lege Junia.

§ 9 I. de hered. inst. (2, 14): Heres et pure et sub condicione institui potest: ex certo tempore aut ad certum tempus non potest. § 10: Impossibilis condicio in institutionibus et legatis, nec non in fideicommissis et libertatibus pro non scripto habetur.

§ 113. *Succession by Necessity.*

The original idea of a will is that it enables a person who has no son to provide a son for himself (supra, p. 542) who shall 'perform all the duties of the testator, human and divine',[1] that is, pay his debts and offer the funeral sacrifices. It follows, as a matter of course, that, where there are sons, there is no room for a will. Such is the condition of the law as we find it in ancient Attica, where the rule was that a man who had lawful sons could not make a will. At a later stage, however, a man who had sons was permitted to make a will in which he appointed his sons heirs, or to make a will for the event of his sons either not surviving him, or surviving him but dying before they attained majority.[2] There are strong grounds for believing that early Roman law passed through a very similar course of development. If a man had a filius suus, he could not, at the outset, make a will at all; if he

[1] Compare the law of Gortyna in Crete, about 400 B.C., x. 42, 43. F. Bücheler and E. Zitelmann, *Das Recht von Gortyn* (1885), p. 134.

[2] Schulin, *op. cit.* p. 15.

had a daughter or a grandchild in his immediate paternal power, he could, it is true, make a will, but the rule was that he could only appoint a stranger testamentary heir *together with* the daughter or grandchild—a rule which probably contains the germ of the subsequent jus accrescendi of such sui (v. infra, p. 554).[3] As against the sui, the power to make a will was excluded by the mere fact that, on death of the father or grandfather, the suus heres was deemed ipso jure in possession of the inheritance (p. 522), so that even if testamentary heirs were appointed, there was no possibility of their carrying out the 'cretio' and thereby obtaining possession of the estate. Nevertheless, as in Athens so in Rome, the right to make a will notwithstanding the existence of sui came ultimately to be acknowledged. In Rome the development of the law resulted in the adoption of the principle of an unrestricted testamentary power, and the effects of the material claims originally enjoyed by the sui were only traceable, at a later period, in certain requirements concerning the form of wills. It is probable that, as in other branches of the law, so here, the ultimate result was reached, not by any abrupt change, but by a series of intermediate modifications of the earlier doctrine.[4] But however this may be, the outcome was that, with the obliteration of the notion of the sui being ipso jure in possession of the inheritance, the ancient ideas of family ownership lost all practical influence and yielded to the stronger claims of patria potestas with its paramount power of disposition over the property and members of the household. The evidence afforded by the rules of succession by necessity, as they actually appear in the historical records of Roman law, justifies us in believing that the leading ideas at work in the

[3] In support of this supposition v. Schirmer, *ZS. d. Sav. St.*, vol. ii. p. 170 ff.; Salkowski, *ibid.*, vol. iii. pp. 201, 202.

[4] The existence of such intermediate stages seems to be indicated more particularly by the system of 'pupillary substitutions which was developed in Athens as well as in Rome. A 'pupillary' substitution—which is opposed to a 'simple' substitution (substitutio vulgaris, cp. supra, p. 550)—means, in the classical law, a will made by the testator for an impubes in his power and intended to take effect in case the latter 'intra pubertatem decesserit'. There are, however, a number of later legal rules which point to the conclusion that, originally, a pupillary substitution meant a will made by the father *for himself*, i.e. a will made for the event of the suus surviving his father, but dying before he attained the age of puberty. The father was thus allowed to make a will notwithstanding the existence of a suus, but as in Attic law, so here, a will of this kind could only take effect, if the suus predeceased his father, or, at any rate, died ante pubertatem.

earliest phase of that branch of the law were such as we have just described.

So far as the Roman law of succession by necessity can be historically authenticated, it presents a twofold aspect: either a formal or a material aspect. In its formal aspect it is concerned with the form of wills; in its material aspect it is concerned with the substance of wills. The formal law of succession by necessity requires that the heir by necessity shall be either instituted or disinherited in the will; in other words, that the testator shall make express mention of his heir by necessity. The material law of succession by necessity requires that every testator shall give his heir by necessity a certain portion—a 'statutory' portion—of his property; in other words, that he shall confer a material benefit on his heir by necessity.

The earliest phase of development being closed, Roman law started, in historic times, with a purely formal law of succession by necessity, and then proceeded gradually to work out a material law of succession by necessity. Finally, under Justinian, a uniform system of succession by necessity was established by means of a fusion of the formal and the material law.

I. According to the civil law, the sui heredes were the only persons who had a right of succession by necessity. Their right was however a purely formal one; that is to say, it was one of the formal requirements of a valid will that the sui heredes should be either instituted or disinherited. If the testator wished to dispose of his estate in favour of other persons, he had first to expropriate those who were co-owners of his property (exheredes facere), because otherwise his property was encumbered and incapable of free disposition in favour of others. In this requirement of exheredatio we have a last trace, or perhaps, in a certain sense, an acknowledgement, of the rights of the family—the family of descendants, namely—as owners of the estate.[5] In order to extinguish the claims of the family and to convert the property into the free and unrestricted property of the holder, an exheredatio was indispensable. And the law required that a filius suus should be disinherited 'nominatim', i. e. by special mention; in the case of

[5] Hölder says (*ZS. d. Sav. St.*, vol. iii. p. 219): 'A testamentary exheredatio, like all acts of expropriation, i. e. like all acts that extinguish a private right in due legal form, implicitly recognizes the existence of the right it extinguishes.'

daughters and grandchildren, an 'exheredatio inter ceteros' was sufficient, i. e. it was enough if the will contained the clause 'ceteri exheredes sunto', a clause which every prudent Roman was in the habit of appending to the institution of the heir.

If the formal requirements of the law as to the rights of heirs by necessity were not satisfied, in other words, if a suus was passed over—being neither instituted nor disinherited (praeteritio)—the result was different, according as the suus in question was a filius suus or another suus. Where the suus passed over was a filius suus, the formal defect was fatal to the will and intestate succession took place. Where other sui—daughters or grandchildren—were passed over, the will remained valid, but the sui praeteriti were admitted to the succession together with the heirs appointed in the will (scriptis heredibus adcrescunt), the rule being that, if the latter were extranei, the sui praeteriti should take together one moiety of the estate, but that, if they were sui, each suus should take a portio virilis, or equal share.

Nor, again, was it sufficient, if the suus were *conditionally* disinherited or instituted (unless indeed the condition was one which merely depended for its fulfilment on the free option of the person conditionally instituted, a so-called condicio potestativa): the suus had also to be instituted or disinherited for the event of the condition failing. If the testator had provided for the appointment of several degrees of heirs by means of an institutio and substitutio (supra, p. 550), a suus who was not instituted had to be expressly disinherited 'ab omnibus gradibus', i. e. the testator had to state his intention to disinherit him as against both the institutus and the substitutus—for which purpose, amongst other modes, an exheredatio at the beginning of the will (ante heredis institutionem) was sufficient.

At the outset a difficulty arose in connexion with the postumi sui (supra, p. 508), who, being personae incertae (p. 550), could neither be instituted nor disinherited. Postumi legitimi, however,—i. e. such postumi as were born after the death of the testator—were invested by traditional usage with testamenti factio passiva, and a lex Junia Velleja conferred the same capacity on postumi born in the life-time of the testator, but after the execution of the will (postumi Vellejani). And prior to the last-named enactment, the praetor Gallus Aquilius had devised a formula by which it became

possible effectually to institute a grandson by a son who, though born after the death of the testator, was *en ventre sa mere* at the time of the death, and who became a postumus suus in consequence of the death of his father (the testator's son) after the execution of the will, but prior to the death of the testator. Postumi of this class are accordingly known as 'postumi Aquiliani'. It was thus that postumi sui gradually became capable of being effectually instituted and—as a rule, at least—of being effectually disinherited. If a testator desired to disinherit a postumus filius, an exheredatio 'by name' (nominatim)—in other words, an express exheredatio—was necessary. If he desired to disinherit other postumi (daughters or grandchildren), an exheredatio 'inter ceteros'—in other words, a tacit exheredatio not expressly mentioning the postumi in question—was sufficient. But as regards postumi of the latter kind, the insertion in the will of the general clause 'ceteri exheredes sunto' only operated as a valid disinherison, if the will contained legacies for the disinherited postumi, so that it was clear that in using the words 'ceteri exheredes sunto' the testator had these particular postumi in his mind. Hence it was thought more prudent to disinherit these other postumi in the same way as a postumus filius, viz. by express mention (nominatim).

The praeteritio of a postumus suus—whether a son, a daughter, or a grandchild—resulted in all cases in what was called a 'ruptio testamenti,' i. e. the entire will became void and intestate succession took place.

II. According to the praetorian law not only the sui, but all the liberi (supra, p. 531), had a formal right of succession by necessity, the rule being that male liberi (sons and grandsons) should be disinherited nominatim, an exheredatio inter ceteros sufficing only in regard to female liberi. The result of a praeteritio in the praetorian law was a bonorum possessio contra tabulas, a bonorum possessio juris civilis corrigendi gratia; in other words, the praeteritio did not operate to annul the will, but merely gave rise to particular legal remedies. For once a praeteritus had actually obtained bonorum possessio contra tabulas from the praetor, he was able, by the aid of the remedies of a bonorum possessor (viz. the interdictum quorum bonorum and the hereditatis petitio possessoria), successfully to assert, as against the testamentary heirs, his contratabular praetorian claim to the amount of his intestacy share.

Accordingly the testamentary institutions of heirs, and the legacies and manumissions based on such institutions, fell to the ground. On the other hand, the appointments of guardians, the pupillary substitutions (p. 552, note 4), and, more especially, the disinherisons contained in the will, remained in force. If, therefore, a person who had a right of succession by necessity was duly disinherited, the praetor would not admit him to the bonorum possessio contra tabulas. But where an heir by necessity was duly instituted, and another heir by necessity obtained bonorum possessio contra tabulas on the ground that he had been improperly passed over, in such a case—'commisso per alium edicto', as it was termed—the instituted heir might, if he found it more advantageous to do so, apply for bonorum possessio contra tabulas in respect of his intestacy share. If bonorum possessio contra tabulas was not applied for within the prescribed period of an annus utilis, the will remained in full force. On the other hand, the praetorian law placed the female liberi and the grandchildren in a privileged position. For not only did they enjoy the jus accrescendi—i. e. the right to share the estate concurrently with the testamentary heirs (supra, p. 554)—but they also obtained their entire intestacy share by the bonorum possessio contra tabulas. The praetorian law was amended in this respect by a rescript of Marcus Aurelius, which provided that female liberi should only take by bonorum possessio contra tabulas such a share as they would have been entitled to take by virtue of the civil jus accrescendi.

III. What we have called the material law of succession by necessity was also of civil law origin. A will in which the testator passed over his nearest relations in order to make over his property to strangers, was thought to argue a lack of natural affection, and was called an 'unduteous' will ('testamentum inofficiosum'). The relations who had been passed over were entitled to bring a 'querela inofficiosi testamenti' for the purpose of impeaching the will and having it set aside on the plea that it was executed by a person of unsound mind.[6]

[6] The fiction of insanity (color insaniae) was probably due to the influence of Greek law. In the early Attic law we find precisely the same form for impeaching an unduteous will as in Rome, the testator being accused by his relatives of *μανία*. Cp. Schulin, *op. cit.* p. 16, where the learned author, at the same time, makes out a good case for believing that the Greek courts went further than the Roman centumviral court in the extent to which they recognized claims to a statutory share.

The right to claim a statutory share was enjoyed by descendants, ascendants, brothers and sisters of the whole blood, and also by consanguinei, or persons descending from the same father (not by uterini); but in the case of brothers and sisters the right only arose if a persona turpis (supra, p. 184 *ad fin.*) was preferred to them in the will. No one could, in any event, claim a statutory share, unless he would actually have had a claim to a share in the estate, if the deceased had died intestate. The requirements of the law in regard to the statutory share were not satisfied, unless the person entitled to such share received at least one fourth of what he would have taken on an intestacy. But the testator was not compelled to give the claimant his fourth by appointing him heir. The law was satisfied, if the testator gave the fourth by his will in any manner whatever, either by appointing the person entitled heir, or by means of a legacy, or in any other way. But the fourth must be given clear of all charges and limitations: it must not be encumbered with a legacy, or hampered with a condition or with a restriction as to time (dies) or as to the purpose to which it is to be devoted (modus). A gift thus hampered was inoperative. In Justinian's law any provision purporting to limit the gift of a statutory share was taken pro non scripto.

If a person entitled to a statutory share had either received nothing at all, or had received less than his share, he was allowed to proceed by the querela inofficiosi testamenti against the persons appointed heirs in the will, with a view to recovering the full amount of his intestacy share. To this extent the will was set aside; for the rest, its provisions remained in force. If, however, the intestacy shares of the petitioners in the querela exhausted the entire estate, the whole will with all its provisions (legacies, &c.) fell to the ground.

If the testator had some good ground for excluding the person claiming a statutory share, the querela inofficiosi testamenti was dismissed. The defendant was held to have proved that the conduct of the testator had been reasonable. The question as to whether the grounds of exclusion were relevant or otherwise, was a matter for the free discretion of the judge. There were no statutory grounds of disinherison.

Since the querela inofficiosi testamenti implied a slur on the personal character of the testator, it was barred, like every other

action de statu defuncti, within five years from his death. And further, since it was an 'actio vindictam spirans'—i. e. an action having for its object the personal satisfaction of the plaintiff (supra, p. 423)—the right to bring it did not pass to the plaintiff's heirs till the litis contestatio. Lastly—and this is most important—the querela inofficiosi testamenti was only available if the person claiming a statutory share had no other legal means of enforcing his right. Thus, if the claimant was in a position to recover his share by bonorum possessio contra tabulas, by reason of the formal requirements of the law as to succession by necessity not having been complied with, the querela inofficiosi testamenti was inadmissible.

On the model of the querela inofficiosi testamenti two further querelae—the querela inofficiosae donationis and the querela inofficiosae dotis—were subsequently developed to meet the case of persons whose right to a statutory share was prejudiced by a gift, or a dos. That is to say, where in consequence of a gift, or a dos, a person received a share of an estate which, after allowance had been made for anything he himself had had by way of gift or otherwise gratuitously, was smaller than the statutory share to which he would have been entitled if the estate had been divided prior to the gift, or the dos, the person so aggrieved could sue by querela inofficiosae donationis, or querela inofficiosae dotis (as the case might be), for a rescission of the gift, or the dos, and for a return of the property by the recipient, so far as such rescission and return were necessary in order to make up the claimant's full statutory share. Like the querela inofficiosi testamenti, these two querelae were only available in the absence of any other legal remedies, and were, generally speaking, subject to the same restrictions as the querela inofficiosi testamenti.

IV. Justinian accomplished a series of reforms on the subject of succession by necessity. In the first place, he enacted that a person who was entitled to a statutory share and who, though he received something under the will, did not receive enough, should not be allowed to sue by querela inofficiosi testamenti for his full intestacy share, but should be required to proceed by an 'actio ad supplendam legitimam', the object of which was merely to compel the testamentary heirs to pay the full amount necessary to make up the claimant's statutory share. By a further innovation—effected by the 18th Novel—Justinian raised the statutory share to one third

of the intestacy share where the portion of the inheritance which the claimant would have taken on an intestacy amounted to at least one fourth of such inheritance, and to one half of the intestacy share, where the portion referred to amounted to less than one fourth of the inheritance.

But Justinian's most important reform was accomplished by the 115th Novel.

The effect of the 115th Novel was to create, as between ascendants and descendants, a fusion of the formal and the material law of succession by necessity. Ascendants were required to institute as heirs such of their descendants as would have been entitled to succeed them on intestacy, and vice versa.[7] Disinherison was only permitted on definite statutory grounds enumerated in the Novel; on the ground, for example, of an attempt on the testator's life. The testator was required to specify the ground of disinherison in his will.

Where these requirements were not satisfied, the party aggrieved was restricted to an actio ad supplendam legitimam if, though instituted heir, he had been given less than his due. But if, in addition to being instituted heir in a certain share, he received from the testator—either in the shape of a legacy or through some other provision in the will—an amount sufficient to make up his full statutory share, the actio ad supplendam legitimam was excluded. Any limitations imposed on the statutory share were taken pro non scriptis. Where, however, the claimant was not instituted heir (and no statutory ground of disinherison was specified), the remedy was a modified querela inofficiosi testamenti, the effect of which was to rescind the institutions to the extent of the claimant's full intestacy share, while leaving the remaining dispositions of the will untouched, e. g. appointments of guardians, pupillary substitutions, and also legacies, so far as the latter did not diminish the statutory share.

As regards brothers and sisters, their rights remained unaltered. They continued as heretofore to be merely entitled to a statutory share and could not claim that the testator should benefit them by

[7] The 115th Novel did not, however, alter the rule that a will is not void by reason only of the fact that the descendant or ascendant is not *instituted* in his full statutory share. If the share in which he is instituted falls short of his statutory share, he can bring an actio ad supplendam legitimam (see the text).

instituting them heirs. If personae turpes were instituted testamentary heirs, brothers and sisters of the deceased who had received nothing under the will were entitled to sue such heirs by the querela inofficiosi testamenti for the amount of their intestacy share. If the amount they received under the will fell short of their statutory share, they could only sue by actio ad supplendam legitimam for payment of the amount necessary to make up their statutory share.

Nov. 115 c. 3: Sancimus igitur non licere penitus patri vel matri, avo vel aviae, proavo vel proaviae, suum filium vel filiam vel ceteros liberos praeterire aut exheredes in suo facere testamento, nec si per quamlibet donationem vel legatum vel fideicommissum vel alium quemcunque modum eis dederit legibus debitam portionem; nisi forsan probabuntur ingrati, et ipsas nominatim ingratitudinis causas parentes suo inseruerint testamento. Sed quia causas ex quibus ingrati liberi debeant judicari in diversis legibus dispersas et non aperte declaratas invenimus, . . . ideo necessarium esse perspeximus eas nominatim praesenti lege comprehendere, ut praeter ipsas nulli liceat ex alia lege ingratitudinis causas opponere, nisi quae in hujus constitutionis serie continentur.—

c. 4 pr.: Sancimus itaque non licere liberis parentes suos praeterire, aut quolibet modo a rebus propriis in quibus habent testandi licentiam eos omnino alienare, nisi causas quas enumeravimus in suis testamentis specialiter nominaverint.—

8 eod.: Si autem haec omuia non fuerint observata, nullam vim hujusmodi testamentum, quantum ad institutionem heredum, habere sancimus: sed, rescisso testamento, eis qui ab intestato ad hereditatem defuncti vocantur, res ejus dari disponimus: legatis, videlicet, vel fideicommissis et libertatibus et tutorum dationibus, seu aliis capitulis . . . suam obtinentibus firmitatem.

§ 114. *The Effect of the Vesting of an Inheritance.*

I. The effect of the vesting of an inheritance was to constitute the heir universal successor of the deceased (supra, p. 503). The heir stepped into the place of the deceased in respect not only of his rights, but also of his liabilities, except so far as such rights and liabilities were extinguished by the death of the deceased (cp. supra, pp. 423, 439, 501). The property of the deceased became the property of the heir—there was what was called a 'confusio bonorum'—and the rights and liabilities of the deceased became the rights and liabilities of the heir. Accordingly the heir was answerable with his own property, if necessary, for the debts of the inheritance, and conversely, the inheritance was answerable for the

personal debts of the heir. In both respects, however, the rule was susceptible of a modification.

The principle that the heir was answerable with his own property for the debts of the inheritance was counteracted—though not till Justinian's time—by the 'beneficium inventarii'. If the heir drew up an inventory of the deceased's property within a prescribed period—viz. three months at latest from the time he became aware of the delatio—he was only liable to the extent of the inheritance, i. e. to the extent of the assets of the deceased, and was entitled to pay the creditors in the order in which they applied to him. His liability came to an end as soon as the inheritance was exhausted.

The principle that the inheritance was answerable for the personal debts of the heir was counteracted by the 'beneficium separationis', which was introduced by the praetor. The creditors of the estate could obtain the beneficium separationis by applying to the judge for a 'separatio bonorum'. It was necessary that such an application should be made within a period of five years, and that the creditors who made it should not have previously entered into any legal transactions with the heir for the purpose of obtaining from him, as heir, payment of debts due to them from the deceased.

Two kinds of action were open to the heir. In the first place, he might proceed by 'singular' action; that is to say, he might avail himself of the particular remedy to which any of the separate rights belonging to the estate gave rise. He was thus, for example, entitled, as against any one who withheld from him a thing of which the deceased had been owner, to assert the deceased's right of ownership by means of a rei vindicatio. A singular action was the appropriate remedy in all cases where the matter at issue between the heir and the defendant was confined to a particular legal relationship as such; where, in other words, the defendant met the heir's claim with a particular defence relevant only to the actual right in dispute, as where he refused to give up a thing on the ground that he had acquired the ownership of it by virtue of a gift from the deceased, or from a third party. Whenever the heir proceeded by singular action, he was seeking to assert, not his title as heir, but merely some separate legal right appertaining to the estate—in the case supposed, the right of ownership. Singular actions were designed to enforce singular rights. In the second place, however, the heir was entitled, by virtue of his heirship, to

proceed by 'universal' action, that is, to claim the estate as such, to the extent, namely, to which it was in the possession of the defendant. This universal action—called 'hereditatis petitio'—was the proper remedy for determining all questions as to the heirship. It was accordingly by hereditatis petitio that the heir proceeded against a 'pro herede possessor', that is, against a person who claimed to be heir himself—not merely owner of this or that thing—and who, by virtue of his heirship—in other words, by virtue of his being *universal* successor of the deceased—claimed to retain portions of the estate as such, thus refusing, for example (if he was 'corporis possessor') to give up things belonging either in law or in fact to the estate, or (if he was 'juris possessor') to pay a debt due from him to the deceased. In the same way the heir could proceed by hereditatis petitio against a so-called pro possessore possessor, that is, against a person who withheld some portion of the estate without any title whatever.[1] In both these cases the heir could require the defendant to hand over everything comprised in the estate, i. e. everything left by the deceased, including things that were only in the physical possession of the deceased. The extent of the liability of a person who was sued by hereditatis petitio was regulated by a senatusconsultum passed in the reign of Hadrian, the SC. Juventianum, of the year 129 A.D. The principle was that the defendant should restore the full amount by which he had been enriched in consequence of his possession of the estate. If, for example, he had sold a res hereditaria, he was bound to hand over the price, the rule being, in such a case, 'pretium succedit in locum rei.' The result of this enactment was to weaken the effect of the usucapio pro herede—which owed its existence to the peculiarities of the earliest law of inheritance (supra, p. 516 ff.)—the defendant being compellable to deliver up the thing in dispute notwithstanding the completion of the usucapio. At the same time

[1] A person is said to possess 'pro possessore' if he, on being asked why he possesses, answers: 'quia possideo'; in other words, if he does not put forward a title of any kind, whether 'universal' or 'singular'. Against such a person the heir can proceed either by hereditatis petitio or by a singular action, and the defendant cannot meet the latter by 'exceptio praejudicii' (see the text above).—The historical significance of the legal rules as to the pro possessore possessor is still somewhat obscure. Among recent works dealing with the question may be mentioned R. Leonhard, *Der Erbschaftsbesitz* (1899), p. 46 ff.; W. Stintzing, *Beitr. z. röm. RG.* (1901), p. 62 ff.

the senatusconsultum drew a distinction between bona fide and mala fide possessors of an estate. A mala fide possessor was required to restore whatever benefit he *might* have had from the estate; in other words, he was liable for damages if he failed to exercise omnis diligentia in regard to the property comprised in the estate, if he, for example, failed to gather fruits which with due care he might have gathered (fructus percipiendi). On the other hand, the bona fide possessor of an estate could only be required to restore whatever benefit he actually had at the time, and he was allowed to deduct all 'impensae' (expenses) incurred by him in connexion with the estate, even though they were neither 'necessariae' nor 'utiles'. His liability for omnis diligentia did not commence till the action was brought. It follows from what has been stated that it was to the interest of the defendant to be sued by hereditatis petitio rather than by a singular action, because in a rei vindicatio the defendant had no such unrestricted right to deduct all his expenses. If the heir sued a pro herede possessor by a singular action, the latter could plead the 'exceptio ne praejudicium hereditati fiat', the effect of which was to compel the heir to proceed by 'universal' action (viz. by hereditatis petitio) with a view to obtaining a decision as to the heirship, and not merely as to the ownership of this or that particular thing. No such plea was, however, open to the pro possessore possessor if sued by a singular action.

As the heir sued by hereditatis petitio, so a person who had obtained bonorum possessio from the praetor could proceed by interdictum quorum bonorum against any one possessing pro herede or pro possessore. The interdict, however, was only available against a corporis possessor (cp. supra, p. 528, n. 17). It was therefore an important step that the praetor subsequently took when he gave the bonorum possessor a utilis hereditatis petitio (a so-called hereditatis petitio possessoria) which was available against a juris possessor as well as a corporis possessor. The interdict quorum bonorum further enabled the successful plaintiff to recover his property from a person who had acquired it by usucapio pro herede, notwithstanding the fact that the term of the usucapio had been completed.

If several heirs succeeded concurrently, the vesting of the inheritance operated as against each of them pro parte hereditaria.

The action by which co-heirs effected a partition of the inheritance among themselves was called the actio familiae erciscundae (supra, p. 413). No partition was required in regard to the claims and liabilities of the estate. Divisible claims and liabilities—that is, claims due to and from the deceased which admitted of partial performance, such as a money debt or an obligation to procure ownership in a definite thing—were by virtue of an old rule contained in the Twelve Tables,—nomina ipso jure divisa sunt—automatically divided between the several co-heirs, each of whom could thus only sue or be sued in respect of part of the claim or liability, e. g. in respect of part of the money debt, or in respect of a fraction of the ownership to be procured. Indivisible claims and liabilities (as where the estate was under a liability to create a praedial servitude) passed in their entirety to each of the co-heirs, who accordingly became solidary creditors, or debtors, in respect of the claim or liability (supra, p. 361 ff.). The actio familiae erciscundae was thus more particularly intended to effect a partition of the joint ownership which resulted from the joint succession, and, at the same time, to adjust any claims for 'praestationes personales' (supra, p. 413) to which the existence of the several co-heirs had given rise.

Where several descendants succeeded jointly to an inheritance, either by virtue of the rules of intestacy, or at any rate (if there was a will appointing them heirs) in accordance with the rules of intestacy, the circumstances might be such as to impose on them a duty to bring property acquired by them in the lifetime of the deceased into hotchpot, in order that it might be taken into account in the distribution of the inheritance. This bringing into hotchpot was called 'collatio', and the rule requiring it was first established by the praetor in the case of an emancipatus. If an emancipatus claimed to be admitted to the bonorum possessio unde liberi (supra, p. 531), the praetor required him to bring *all* his bona into hotchpot —this was called 'collatio bonorum'—on the ground that, if he had remained a suus, all his property would have passed to his father and would thus have formed part of the estate (cp. supra, p. 532). Guided by similar considerations the praetor subsequently laid it down that a daughter or granddaughter who had a claim for the recovery of a dos on the dissolution of her marriage (supra, p. 470) should, on being admitted to the succession as a sua, bring

her dos into hotchpot (collatio dotis), on the ground that, if the claim to the dos had been immediately enforceable, it would have formed part of the estate of the person (the father or grandfather) in whose power she had been. The object of these praetorian rules of collatio was to ensure that, as between several joint descendants, the estate of the paterfamilias should be distributed in such a way as to redress any inequality that might have previously existed between them in regard to their capacity for acquiring property. When, during the Empire, filiifamilias became fully capable of holding property of their own (supra, p. 484), the *raison d'être* of the older rules of collatio of course disappeared, the former inequality between emancipati and sui in regard to the acquiring of property having ceased on principle to exist. Accordingly the scope of the rules of collatio as they appear in the later imperial legislation (from the Emperor Leo, A. D. 472, onwards) was different from that of the older rules. The aim of the later rules was to compel descendants who had received certain benefits from their ancestor in the lifetime of the latter to bring those benefits into hotchpot in favour of their co-descendants, when the estate of the ancestor came to be distributed—unless indeed the ancestor himself had given directions to the contrary. The benefits referred to included, in the case of a daughter, a dos, in the case of a son, a donatio propter nuptias, and, in certain circumstances, gifts. The object of the later rules of collatio was to ensure that, as between several joint descendants, the estate should be distributed in such a way as to redress any inequality in the benefits previously bestowed on them by their ancestor.

L. 9 D. de her. pet. (5, 3) (ULPIAN.): Regulariter definiendum est eum demum teneri petitione hereditatis qui vel jus pro herede vel pro possessore possidet, vel rem hereditariam.

L. 11. 12 eod. (ULPIAN.): Pro herede possidet qui putat se heredem esse.—Pro possessore vero possidet praedo qui interrogatus, cur possideat, responsurus sit: quia possideo, nec contendet se heredem, vel per mendacium.

§ 3 I. de interd. (4, 15): Adipiscendae possessionis causa interdictum accommodatur bonorum possessori, quod appellatur quorum bonorum. Ejusque vis et potestas haec est ut, quod ex his bonis quisque, quorum possessio alicui data est, pro herede aut pro possessore possideat, id ei cui bonorum possessio data est restituere debeat. Pro herede autem possidere videtur qui putat se heredem esse.

Pro possessore is possidet qui nullo jure rem hereditariam, vel etiam totam hereditatem, sciens ad se non pertinere possidet.

L. 2 D. de poss. her. pet. (5, 5) (GAJUS): Per quam hereditatis petitionem tantundem consequitur bonorum possessor, quantum superioribus civilibus actionibus heres consequi potest.

II. In some cases the law placed obstacles in the way of the vesting of an inheritance.

1. Inability to become heir.

According to the law of the Empire the children of persons guilty of high treason, apostates and heretics, as well as widows who violated their year of mourning, were disqualified by special enactments from becoming heirs. As regards widows, however, their disqualification only extended to testamentary inheritances and to inheritances devolving upon them on intestacy ultra tertium gradum. For the rest, according to the law of Justinian, any one who enjoyed a general proprietary capacity was ipso facto qualified to become an heir, but it was essential that the person claiming to be heir should have been in existence—at any rate as a nasciturus (supra, pp. 164, 541)—at the time of the death of the deceased. In the case of a person disqualified from becoming an heir, there could not even be a delatio of the inheritance. The inheritance devolved in any such case in just the same manner as if the disqualified party did not exist.

2. 'Incapacity.'

'Incapacity,' in the special technical sense of the term, meant merely inability to acquire under a will. Incapacity did not prevent the delatio, but only the acquisitio of the inheritance. Incapacity, in this sense, was unknown in Justinian's law. The most notable case, prior to Justinian, was the incapacity annexed by the lex Julia et Papia Poppaea to celibacy and childlessness, caelibes being declared totally incapable of taking any inheritance or legacy that might be offered to them by virtue of a will, and orbi being only allowed to take one half of any such inheritance or legacy (supra, p. 478).

3. Unworthiness.

Unworthiness did not prevent either delatio or acquisitio. But the law declared that the property which had vested in an indignus should be divested again (eripi), either in favour of the fiscus or in favour of a third party who had a claim to it (bona ereptoria). It was, for instance, a rule that if the heir killed the testator or

intestate, he should forfeit his inheritance in favour of the fiscus. He was considered unworthy to *keep* the inheritance.

§ 115. *Bequests.*

I. Legatum.

Legatum was the formal bequest of the civil law, a bequest charged verbis imperativis, in a set form of words, on a testamentary heir by means of a will. Its sole purpose was to confer on third parties certain separate benefits at the expense of the deceased's estate. As opposed to the succession of an heir to his inheritance—which was a universal succession—the succession of a legatee to his legacy was, in its essence, a singular succession. A legatum only conferred rights; debts could not be the subject of a bequest. According to the civil law a testator might convey a right to his legatee in one of two ways, either directly or indirectly.

1. The 'legatum per vindicationem' operated as a *direct* conveyance of a right to the legatee. Its effect was to invest the legatee ipso jure with the ownership of, or with a servitude over, a thing that had belonged to the testator in quiritary ownership. For example: Titio hominem Stichum do lego, or: Titio usumfructum fundi Corneliani do lego. A legatee taking per vindicationem could proceed at once to assert his right by a rei vindicatio or by an action claiming the servitude (a 'juris vindicatio'), as the case might be, no prior mancipatio or traditio, or (if a servitude was bequeathed) no prior grant of the servitude, being required on the part of the heir.

2. The 'legatum per damnationem' was the form of legacy principally employed for the purpose of *indirectly* conveying a right to the legatee. The effect of such a legacy was to impose a solemn duty on the heir to procure the legatee the quiritary ownership of a thing, or some other proprietary benefit. For example: heres meus Stichum servum meum dare damnas esto. A legatee taking per damnationem did not acquire the immediate ownership of the thing bequeathed; all he acquired was an obligatory right to a 'dare' or 'facere' (cp. supra, p. 367) on the part of the heir. A testator however, could bequeath per damnationem not only his own, but also other persons' property. In the latter case the heir was bound either to procure the res aliena or to pay the legatee its value. In point of validity, the legatum per damnationem was the safest, and, in that sense, the best kind of legacy. There was another form of

legacy—the 'legatum sinendi modo'—which was akin to the legatum per damnationem. The words used by the testator were: heres meus damnas esto sinere L. Titium hominem Stichum sumere sibique habere. This form was available for the purpose of bequeathing not only things belonging to the testator, but also things belonging to the heir (not, however, things belonging to third persons). The effect of a legatum sinendi modo, like that of a legatum per damnationem, was merely to impose an obligation on the heir, but the object of the obligation was not 'dare', but only 'sinere', i. e. the heir was only bound *to permit* the legatee to take the thing bequeathed to him. Another form of legacy, the 'legatum per praeceptionem' (L. Titius hominem Stichum praecipito), was also related to the legatum per damnationem, but was only available for bequests of things comprised in the inheritance—whether they belonged to the testator in quiritary ownership or not—and only where the beneficiary was one of several co-heirs. Its effect was to impose a duty on the other co-heirs to allow the favoured co-heir, in the judicium familiae erciscundae (which was the proper proceeding for enforcing such a legacy), to retain the thing bequeathed to him in addition to his share of the inheritance.[1]

The SC. Neronianum enacted that any legacy which would otherwise have been void by reason of the failure of the testator to comply with the forms required in the particular legacy he had chosen (e. g. a legatum per vindicationem), should be construed as a legatum per damnationem and upheld as such. The effect of every legatum, after the senatusconsultum, was to impose an obligation on the heir to carry out the terms of the bequest.

Ulp. tit. 24 § 1: Legatum est quod legis modo, id est imperative, testamento relinquitur: nam ea quae precativo modo relinquuntur fideicommissa vocantur.

[1] Not being couched in the imperative language of a legatum per damnationem, a legatum per praeceptionem merely signifies, legally speaking, a *desire* on the part of the testator (praecipito). There is accordingly no independent action by which such a legacy can be recovered, and the legatee must rely for the assertion of his claim on the officium judicis as exercised (ex bona fide) in the judicium familiae erciscundae. The ownership of the thing does not vest in the legatee (the co-heir) at once by virtue of the legacy, but only by virtue of the adjudicatio pronounced by the judge in the proceedings in which the inheritance is divided, Cp. Hölder, *Beiträge z. Geschichte d. röm. Erbrechts*, p. 80 ff.—As to the comparative antiquity of the various forms of legacies, see Hölder, *ibid.* p. 76 ff.; Karlowa, *Röm. RG.*, vol. ii. p. 916 ff.; Voigt, *Röm. RG.*, vol. i. pp. 519, 524.

GAJ. Inst. II § 193: Per vindicationem hoc modo legamus: TITIO verbi gratia HOMINEM STICHUM DO LEGO; sed et si alterutrum verbum positum sit, veluti DO aut LEGO, aeque per vindicationem legatum est; item, ut magis visum est, si ita legatum fuerit: SUMITO, vel ita: SIBI HABETO, vel ita: CAPITO, aeque per vindicationem legatum est. § 194: Ideo autem per vindicationem legatum appellatur, quia post aditam hereditatem statim ex jure Quiritium res legatarii fit; et si eam rem legatarius vel ab herede vel ab alio quocumque qui eam possidet petat, vindicare debet, id est intendere suam rem ex jure Quiritium esse. § 196: Eae autem solae res per vindicationem legantur recte quae ex jure Quiritium ipsius testatoris sunt; sed eas quidem res quae pondere, numero, mensura constant, placuit sufficere, si mortis tempore sint ex jure Quiritium testatoris, veluti vinum, oleum, frumentum, pecuniam numeratam. Ceteras res vero placuit utroque tempore testatoris ex jure Quiritium esse debere, id est, et quo faceret testamentum, et quo moreretur, alioquin inutile est legatum.

Eod. § 201: Per damnationem hoc modo legamus: HERES MEUS STICHUM SERVUM MEUM DARE DAMNAS ESTO. Sed et si DATO scriptum fuerit, per damnationem legatum est. § 202: Eoque genere legati etiam aliena res legari potest, ita ut heres redimere et praestare, aut aestimationem ejus dare debeat. § 203: Ea quoque res quae in rerum natura non est, si modo futura est, per damnationem legari potest, velut FRUCTUS QUI IN ILLO FUNDO NATI ERUNT, aut QUOD EX ILLA ANCILLA NATUM ERIT. § 204: Quod autem ita legatum est, post aditam hereditatem, etiamsi pure legatum est, non ut per vindicationem legatum continuo legatario adquiritur, sed nihilominus heredis est, et ideo legatarius in personam agere debet, id est intendere heredem sibi dare oportere: et tum heres, si res mancipii sit, mancipio dare aut in jure cedere possessionemque tradere debet; si nec mancipii sit, sufficit si tradiderit.

Eod. § 209: Sinendi modo ita legamus: HERES MEUS DAMNAS ESTO SINERE LUCIUM TITIUM HOMINEM STICHUM SUMERE SIBIQUE HABERE. § 210: Quod genus legati plus quidem habet quam per vindicationem legatum; minus autem quam per damnationem. Nam eo modo non solum suam rem testator utiliter legare potest, sed etiam heredis sui: cum alioquin per vindicationem nisi suam rem legare non potest; per damnationem autem cujuslibet extranei rem legare potest.

Eod. § 216: Per praeceptionem hoc modo legamus: L. TITIUS HOMINEM STICHUM PRAECIPITO. § 217: Sed nostri quidem praeceptores nulli alii eo modo legari posse putant nisi ei qui aliqua ex parte heres scriptus esset: praecipere enim esse praecipuum sumere; quod tantum in ejus persona procedit qui aliqua ex parte heres institutus est, quod is extra portionem hereditatis praecipuum legatum habiturus sit. § 219: Item nostri praeceptores, quod ita

legatum est, nulla alia ratione putant posse consequi eum cui ita fuerit legatum, quam judicio familiae erciscundae, quod inter heredes de hereditate erciscunda, id est dividunda, accipi solet: officio enim judicis id contineri ut ei quod per praeceptionem legatum est adjudicetur.

ULP. tit. 24 § 11: Senatusconsulto Neroniano . . . cautum est ut, quod minus aptis verbis legatum est, perinde sit ac si optimo jure legatum esset: optimum autem jus legati per damnationem est.

II. Fideicommissum.

Besides the formal legatum, an informal kind of bequest came into use which was called 'fideicommissum'. A fideicommissum arose, where the deceased, with a view to conferring a benefit on a third party, imposed on another, in precatory terms (verbis precativis), a purely conscientious obligation (hence the name 'fidei commissum') to make over to the third party the benefit thus informally conferred on him. The person on whom the conscientious obligation was imposed was called the 'fiduciarius'; the third party, on whom the benefit was conferred, was called the 'fideicommissarius'. A fideicommissum could be created apart from the testator's will, and in the absence of any will—being imposed on the heir ab intestato—or again it could be charged on a person other than the heir, e. g. on a legatee. A fideicommissum could be imposed on any person — including the fideicommissarius himself — who received any benefit from the testator on his (the testator's) death. It might be created by parol or by writing, and either with or without witnesses. As a rule it took the form of a letter (codicilli) addressed to the fiduciarius. In spite of their informality fideicommissa became legally enforceable from the time when the Emperor Augustus established an extraordinaria cognitio in favour of fideicommissarii. The magistrate—a special 'praetor fideicommissarius' was subsequently appointed to adjudicate on such matters—was empowered, causa cognita, to compel the fiduciarius, where he saw fit, to perform the trust in favour of the beneficiary (supra, p. 108). The right which the beneficiary acquired by virtue of the fideicommissum was in every case a mere obligatory right against the person charged with the trust, and never a direct right of ownership. Nevertheless it was obvious that the rules concerning the fideicommissum, the bequest of the jus gentium, were gradually revolutionizing all the civil law rules on legacies. Practically speaking, formal and informal bequests had come to produce precisely the same result, viz.

an *obligation* on the part of the heir to make over the thing bequeathed.

§ 1 I. de fideic. hered. (2, 23): Sciendum itaque est omnia fideicommissa primis temporibus infirma esse, quia nemo invitus cogebatur praestare id de quo rogatus erat. Quibus enim non poterant hereditates vel legata relinquere, si relinquebant, fidei committebant eorum qui capere ex testamento poterant. Et ideo fideicommissa appellata sunt, quia nullo vinculo juris, sed tantum pudore eorum qui rogabantur continebantur. Postea primus divus Augustus, semel iterumque gratia personarum motus, vel quia per ipsius salutem rogatus quis diceretur, aut ob insignem quorundam perfidiam, jussit consulibus auctoritatem suam interponere. Quod quia justum videbatur et populare erat, paulatim conversum est in adsiduam jurisdictionem, tantusque favor eorum factus est ut paulatim etiam praetor proprius crearetur qui de fideicommissis jus diceret, quem fideicommissarium appellabant.

Ulp. tit. 25 § 1: Fideicommissum est quod non civilibus verbis, sed precative relinquitur, nec ex rigore juris civilis proficiscitur, sed ex voluntate datur relinquentis. § 2: Verba fideicommissorum in usu fere haec sunt: FIDEICOMMITTO, PETO, VOLO DARI, et similia. § 3: Etiam nutu relinquere fideicommissum usu receptum est.

Eod. § 4: Fideicommissum relinquere possunt qui testamentum facere possunt, licet non fecerint. Nam intestato quis moriturus fideicommissum relinquere potest.

Eod. § 12: Fideicommissa non per formulam petuntur, ut legata, sed cognitio est Romae quidem consulum, aut praetoris qui fideicommissarius vocatur, in provinciis vero praesidum provinciarum.

III. The Assimilation of Legata and Fideicommissa.

The assimilation of legata and fideicommissa was effected by disencumbering the former of their traditional forms (e. g. the solennia verba), on the one hand, and by imposing certain forms on fideicommissa, on the other hand. Constantine had already enacted that legata should be valid even without solennia verba, testators being thus left free to use whatever words they chose. Justinian finally proceeded to sweep away the distinction altogether.

Under Justinian there was but one kind of bequest, and it was called indifferently legatum or fideicommissum.

The rule in Justinian's law was that every legacy, whatever the form in which it was given, should impose on the person charged with it an obligation to carry it into effect. The legatee's remedy was an actio in personam against the person charged, viz. the actio

legati. If the testator directly bequeathed a right of ownership or any other real right in a thing belonging to the inheritance, the legatee acquired the real right thus bequeathed at once, without any traditio on the part of the heir, the right so acquired being additional to the legatee's right in personam.[2]

As regards form, Justinian's law demanded that every bequest should be given either by a will or by a codicil. The formal requirements of a codicil were the same as those of a will—it could accordingly be executed either orally or in writing—except that, in the case of a codicil, five witnesses were sufficient and the seals of the witnesses might be dispensed with. A codicil might be executed without any will (codicilli ab intestato), or in addition to a will (codicilli testamentarii); and in the latter case it might be either confirmed by the will (codicilli confirmati) or not confirmed by the will (codicilli non confirmati). Justinian, however, provided that, even where a testator gave a bequest by means of a simple declaration to the person upon whom he charged it, without any formality whatever, the beneficiary should be allowed to sue for the bequest, but that if the person charged denied on oath that any such bequest had in fact been imposed on him, the beneficiary should not be entitled to recover it. This was the so-called fideicommissum orale, an institution testifying to the survival of the old principles of fideicommissa even in the law of the Corpus juris.[3]

§ 3 I. de leg. (2, 20): Cum enim antiquitatem invenimus legata quidem stricte concludentem, fideicommissis autem, quae ex voluntate magis descendebant defunctorum, pinguiorem naturam indulgentem, necessarium esse duximus omnia legata fideicommissis exaequare, ut nulla sit inter ea differentia, sed, quod deest legatis, hoc repleatur ex natura fideicommissorum, et si quid amplius est in legatis, per hoc crescat fideicommissorum natura.

[2] According to the German Civil Code the only effect of a legacy is to impose an *obligation* on the person charged with the legacy. Under the Code therefore every legacy operates in the same way as a legatum per damnationem. The Code has abolished the legatum per vindicationem, and with it the possibility of directly transferring ownership or any other real right by means of a legacy. Cp. supra, p. 316, n. 4.

[3] Another fideicommissum that could be created all along without any of the formal requirements of a bequest was the 'fideicommissum a debitore relictum'. As a matter of law, however, this so-called fideicommissum was not really a bequest at all, but a contract in favour of a third party which owed its name merely to the fact that it produced effects similar to those of a bequest. Cp. supra, p. 415.

§ 116. *Restrictions on Bequests.*

The principle of Roman law is that the heir's liability for bequests shall be limited to the amount of the estate—the net amount, that is, after deduction of the debts—and shall not extend to his own property. For a bequest is, by its very nature, a benefit conferred at the expense of an inheritance. A further limitation of the heir's liability in respect of bequests becomes, however, desirable in the interests of the legatees themselves. For if the heir is directed to pay away the entire inheritance in legacies, it is scarcely likely that he will be disposed to accept an inheritance thus encumbered without any advantage whatever to himself and solely in the interests of others. He will prefer, in such circumstances, to refuse the inheritance, the result being that the legatees receive none of the benefits intended for them. It becomes therefore advisable, in the interests of the parties concerned, to effect a sort of compromise between the heir and the legatees, which shall offer the former some inducement to accept the inheritance and shall, at the same time, secure to the latter a portion, at any rate, of their legacies.

Attempts at a compromise of this kind were repeatedly made in Roman legislation. Thus a lex Furia enacted that no legatee—unless he were a close relation—should be entitled to demand more than 1000 asses in respect of a legacy. The lex Voconia (169 B. C.) provided that no legacy should be in excess of the amount given to the heir.[1] The object aimed at by the legislature was at last effectually secured by the lex Falcidia (40 B. C.), which provided that a testator should, in all cases, leave his heir one clear fourth of the inheritance (the so-called quarta Falcidia) free of legacies. If the aggregate value of the legacies charged on the heir exceeded the fixed limit—viz. three-fourths of the net value of the share of the inheritance to which the heir charged with the legacies was entitled—they all suffered a proportionate abatement. The lex Falcidia only applied, in the first instance, to legacies: the SC. Pegasianum (75 A. D.) subsequently extended it to fideicommissa. In any case, however, the benefits of the law only affected the heir, and not a legatee who, in his turn, was charged with legacies.

By the law of Justinian a testator was permitted to exclude his

[1] As to these popular enactments, see the recent observations of Karlowa in his *Röm. RG.*, vol. ii. p. 939 ff.

heir from the quarta Falcidia, and if the heir failed to draw up an inventory of his testator's estate (supra, p. 561), he was punished by forfeiting his right to the quarta. The German Civil Code—following in this respect the more recent legislation of the separate German States—has entirely abolished the rules as to the quarta Falcidia, and the heir is now in every case liable for the legacies to the extent of the estate.

GAJ. Inst. II § 224: Sed olim quidem licebat totum patrimonium legatis atque libertatibus erogare, nec quicquam heredi relinquere, praeterquam inane nomen heredis. Idque lex XII tabularum permittere videbatur, qua cavetur ut quod quisque de re sua testatus esset, id ratum haberetur, his verbis: UTI LEGASSIT SUAE REI ITA JUS ESTO. Quare, qui scripti heredes erant, ab hereditate se abstinebant; et idcirco plerique intestati moriebantur. § 225: Itaque lata est lex Furia, qua, exceptis personis quibusdam, ceteris plus mille assibus legatorum nomine mortisve causa capere permissum non est. Sed et haec lex non perfecit quod voluit. Qui enim verbi gratia quinque milium aeris patrimonium habebat, poterat, quinque hominibus singulis millenos asses legando, totum patrimonium erogare. § 226: Ideo postea lata est lex Voconia, qua cautum est ne cui plus legatorum nomine mortisve causa capere liceret quam heredes caperent. Ex qua lege plane quidem aliquid utique heredes habere videbantur, sed tamen fere vitium simile nascebatur. Nam in multas legatariorum personas distributo patrimonio, poterat testator adeo heredi minimum relinquere ut non expediret heredi hujus lucri gratia totius hereditatis onera sustinere. § 227: Lata est itaque lex Falcidia, qua cautum est ne plus ei legare liceat quam dodrantem. Itaque necesse est ut heres quartam partem hereditatis habeat; et hoc nunc jure utimur.

§ 117. *Universal Fideicommissa.*

The fideicommissum was by its nature available as a means for conveying any kind of request from the testator to the fiduciarius, including therefore a request that the fiduciarius should transfer to a third party—either in its entirety or in a rateable portion—the share of the inheritance which he received either ab intestato or ex testamento from the deceased. But in lending itself to such a purpose, the fideicommissum was in fact outstepping the bounds imposed on legacies proper. A universal fideicommissum of this kind—a fideicommissum of an inheritance—virtually constituted a covert and indirect institution of the third party as heir. It was a form of legacy which tended to produce the effect of a *universal* succession.

In the beginning, indeed, it was a legal impossibility for

fideicommissa of this type to realize the tendency inherent in them. There was no process known to the law by which the transfer of a share of an inheritance, and more especially the transfer of hereditary debts, could be accomplished. In order therefore to find a form—and a legal form—in which this hitherto unknown transaction might be effected, resort was had to the analogy of a transaction with which people were familiar and which had already received its full development. This transaction was the sale of an inheritance, or of a share of an inheritance. With a view to performing his fideicommissum the heres fiduciarius, who was charged with the universal fideicommissum, sold the inheritance by a fictitious sale (nummo uno) to the fideicommissarius. The result of the sale was to bind the heres fiduciarius, as the fictitious vendor of the inheritance, to hand over all the hereditary assets to the fideicommissarius, the latter being bound, in his turn, as the fictitious purchaser, to save the fiduciarius (the vendor) harmless in respect of the debts of the estate. As in a sale of an inheritance, so here, the parties entered into stipulationes for the purpose of more accurately defining their reciprocal obligations and rendering them enforceable by action. Nevertheless the upshot of the whole transaction was a mere singular succession. The fideicommissarius acquired the rights of the deceased, but the fiduciarius remained liable for his debts, for the simple reason that he (the fiduciarius) remained, in all respects, the heir. The only difference was that the fideicommissarius was bound to indemnify the heir against any liabilities he incurred.[1]

It was at this point that the SC. Trebellianum (62 A. D.) took the decisive step, by enacting, in effect, that the declaration by which the heres fiduciarius transferred the inheritance should operate, immediately and of its own force, to transfer not only the assets, but also an aliquot share of the liabilities, to the universal fideicommissarius. That is to say, the mere declaration by which the

[1] The effect produced by a 'partitio legata', which was feasible according to the civil law, was the same as that described in the text. In a partitio legata the legatee received an aliquot share of the assets subject to an obligation to indemnify the heir to the extent of a corresponding share of the liabilities. As in the case above, so here, both parties covenanted by stipulationes ('stipulationes partis et pro parte') for the performance of their respective obligations. A comparison may also be suggested between the case mentioned in the text and the effects of an in jure cessio hereditatis, when carried out *post* aditam hereditatem; v. supra, p. 510, n. 3.

fiduciarius transferred the inheritance had ipso jure the effect of entitling the fideicommissarius—assuming him to have accepted the bequest—to enforce the testator's rights by praetorian actiones utiles, and, on the other hand, the effect of rendering him liable to the creditors of the estate suing—also by praetorian actiones utiles—in respect of the debts left by the deceased. The heres fiduciarius, having parted with the assets, was at the same time discharged from the debts. So far as he had transferred the inheritance, he continued to be heir only in name. The transferee, on the other hand (the universal fideicommissarius), stood loco heredis to the extent of the share transferred to him—i. e. the praetorian law treated him to the extent stated in all respects as if he were actually the heir—and accordingly he had the same legal remedies as the heir, the hereditatis petitio being granted to him in the shape of an hereditatis petitio fideicommissaria. The fact that the universal fideicommissarius took over the debts as well as the rights distinguished him as a *universal* successor from a person who had really received a mere legacy. The universal fideicommissum constituted practically a new mode of instituting an heir, and a mode which, so far from being hampered with the restrictions incident to a formal institution, was governed, in all its requisites, by the far freer rules concerning fideicommissa. A universal fideicommissum might be created, like any other fideicommissum, in favour of a person who was not in existence, not even as a nasciturus, at the date of the testator's death. A universal fideicommissum might, like any other fideicommissum, be created subject to a dies a quo, the testator providing that the heir should not be required to hand over his share till after the lapse, say, of ten years. And again, a universal fideicommissarius, like any other fideicommissarius, might be charged with a second fideicommissum —in this case, again, a universal fideicommissum—which latter fideicommissum might, in its turn, be subjected to a condition or to a limitation as to time (dies). Thus, through the medium of a universal fideicommissum, it became in fact possible to institute an heir subject to a dies a quo or a dies ad quem or a resolutive condition, which, as we have seen above (p. 550), was inadmissible in the case of a formal heredis institutio.

The result thus arrived at was modified, to some extent, by the SC. Pegasianum (75 A. D.), which extended the quarta Falcidia from legacies to fideicommissa, including universal fideicommissa (supra,

p. 573). If the fourth was actually deducted by the heres fiduciarius, the result was, once more, a mere singular succession, and the necessity for stipulationes partis et pro parte arose again. But the universal fideicommissarius was, at the same time, given the right to compel the instituted heres fiduciarius to enter upon, and consequently also to transfer, the inheritance. If he availed himself of this right, the Falcidian fourth was not deducted, and the fideicommissarius—who was now a universal fideicommissarius—stepped, in all respects, into the place of the heir who had thus compulsorily entered upon the inheritance.

Justinian brought the development to a close by consolidating the SC. Pegasianum and the SC. Trebellianum. The heres fiduciarius was allowed to retain his fourth—called by modern writers the 'quarta Trebellianica'—but even where the fourth was deducted, the universal fideicommissarius became a universal successor in respect of the three-fourths transferred to him, the transfer thus operating ipso jure to render him answerable for his share of the debts. Moreover, the universal fideicommissarius had the same right of compulsion against the heir as he possessed under the SC. Pegasianum, and if he exercised this right, the whole share of the heir was transferred to him. A universal fideicommissum had thus been definitively converted into an indirect mode of heredis institutio resulting in all cases in a universal succession. In its practical result the universal fideicommissum became in Roman law the means by which a testator was able to appoint one or more heirs in succession to the heir first appointed. Cp. the sections of the German Civil Code dealing with 'Nacherben' (§ 2100 ff.).

§ 2. I. de fideic. her. (2, 23): Cum igitur aliquis scripserit: LUCIUS TITIUS HERES ESTO, poterit adjicere: ROGO TE, LUCI TITI, UT, CUM PRIMUM POSSIS HEREDITATEM MEAM ADIRE, EAM GAJO SEJO REDDAS, RESTITUAS. Potest autem quisque et de parte restituenda heredem rogare, et liberum est vel pure vel sub condicione relinquere fideicommissum vel ex die certo.

§ 118. *Mortis causa capio.*

Mortis causa capio is a general term for any mode of acquisition that takes effect by virtue of the last wishes of a dead person. It means more particularly a mode of acquisition on death which does not take the form of a succession to an inheritance or of a legacy.

Where, for example, a testator institutes Maevius as his heir subject to the condition 'si Titio decem dederit,' and Maevius pays Titius the money 'condicionis implendae causa,' the receipt by Titius of the money would be a case of mortis causa capio.

A mortis causa donatio (supra, p. 212) is also a form of mortis causa capio. True, a mortis causa donatio is not deemed part of the inheritance, but is held to vest as from the last moment of the *life* of the deceased, and is consequently independent of the aditio of the inheritance. Nevertheless, a mortis causa donatio is governed, on principle, by the same rules of law as a legacy, because, like a legacy, it reduces the amount of the estate and represents, in that sense, a disposition on the part of the deceased concerning the property left by him on his death. A mortis causa donatio can be validly constituted in all cases—even where it exceeds the limits imposed on gifts (supra, p. 212)—by means of a codicil, i. e. without the necessity of a judicial insinuatio. It is subject to the deduction of the Falcidian fourth by the instituted heir, and—like a legacy again—it presupposes the solvency of the estate, so that it can only take effect, if sufficient assets remain after the deduction of the debts. The primary duty of the estate is, in every case, to satisfy the claims of its creditors. While the remaining departments of private law are dominated by the interests of the owner, the law of inheritance is dominated by the interests of the creditor.

INDEX

(The references are to the pages. Figures in thick type indicate references to the Latin extracts. The small figures placed in brackets after the larger ones refer to the foot-notes.)

A

Abdicatio tutelae, 499.
Abélard, 145 (9).
Absolute law, 27.
— **rights**, 307, 308 (1).
Acceptilatio literis, 394, 435, 436.
— **verbis**, 435, 436, 437 : *and see* 363, 420 (4).
Accession, 323, 326, 327 (*and see* 350).
Accessio possessionis, 320, 334 (3).
Accident, *see* **Casus**.
Accursius, 136, 137, 138.
Accusatio suspecti tutoris, 499.
Acquisitio hereditatis, 506, 507–10 : *and see* 519–28, 566.
Acquisitiones civiles and naturales, 309 : *see* **Ownership**.
Actio, strict meaning of, 230, 240, 253.
Actiones, classifications of, 263–6 : limitation of, 282–4.

CLASSES OF ACTIONES :

Actio adjecticiae qualitatis, 432 : *see also* 165 (1), 222 (2), 462.
— **aedilicia**, 400, 401.
— **arbitraria**, 273–4 (cp. 271, 272).
— **bonae fidei**, opposed to an actio stricti juris, 62, 265, cp. 468 (4) : distinguished from an actio arbitraria, 274 : *see also* **Negotia bonae fidei**.
Actio civilis (as opposed to honoraria), 261.
— **de statu defuncti**, 283 (1), 558.
— **directa** (as opposed to utilis), 259–62 : *see also* 278 (9), 432.
— **ex contractu and ex delicto**, 265, 266 (cp. § 77).
— **ex interdicto**, 293.
— **famosa**, 184 (cp. 62 (12), 423, 499) : *and see* **Infamia**.
— **ficticia**, 259–60 : examples of, 328–9, 427 (3), 528, 529.
— **honoraria**, 261.
— **in bonum et aequum concepta**, 468 (4).
Actio in factum civilis, praescriptis verbis, 379, 380, 381 (6) : cp. 409 : distinguished from an actio in factum simply, 258 (1).
— **in factum concepta**, 258–62, cp. 468 (4) : operation of an exceptio in an, 278–9 : *see also* 62 (14).
— **in jus concepta**, 258 : directa or utilis, 259, 260.
— **in personam and in rem**, 263–5, 266 : Labeo probable author of this division, 94 : the special legis actiones all actiones in personam, 288.
— **in rem**, *see preceding word*.
— **in rem scripta**, 264–5.
— **mixta**, 266, 417 : examples of, 419, 424, 425.
— **noxalis**, against master for delicts of slave (or filiusfamilias), 165 (1), 425, 428 : against husband for delicts of wife in manu, 462 : co-owners of a slave correally liable to an, 360 (2) : *and see* 269, 270, 272, 274.
— **perpetua**, 282–4.
— **poenae persequendae causa comparata or poenalis**, 266, 417 : cp. 282, 283, 420.
— **popularis**, 266 : *and see* 425.
— **praejudicialis**, *see* **Praejudicium**.
— **praescriptis verbis**, *see* **Actio in factum civilis**.
— **rei persequendae causa comparata**, 266, 417 : cp. 420.
— **stricti juris**, 62, 265 : *see also* 97, 269–73 and **Negotia stricti juris**.
— **temporalis**, 282–4.
— **utilis**, opposed to an actio directa (q. v.).
— **vindictam spirans**, 423, 558.

PARTICULAR ACTIONES :

Actio ad exhibendum, 268, 274.
— **ad supplendam legitimam**, 558, 559, 560.
— **arbitraria**, 273, 274

Actio auctoritatis, 50, 59 (10), 306.
— certae creditae pecuniae, 233 (3).
— commodati, 376 : *see also* 268.
— communi dividundo, 413 : *see also* 266.
— conducti, 404, 405.
— confessoria, 346 (*see also* 268) : utilis, 349.
— de arboribus succisis, 232 (3), 240, 241.
— de dolo (doli), 210, 274, 423 : *see also* 268.
— de effusis vel dejectis, 424.
— de eo quod certo loco, 273 (*and see* 269, 270, 272, 274).
— de in rem verso, 429, 431, 432, 433.
— de pauperie, 425 : *and see* 360 (3).
— de peculio, 429, 433 : *see also* 485.
— de pecunia constituta, 416.
— depositi, 377 : plea of set-off not allowed in an, 446 : *see also* 268.
— de posito vel suspenso, 424, 425.
— de recepto, 411.
— doli, *see* Actio de dolo.
— emti, 398, 399, 400, 401.
— exercitoria, 222 (3), 430, 431, 433.
— ex stipulatu, 388, 390 : for the recovery of a dos, 469, 470 : Justinian's statutory, 471, 472, 473.
— (judicium) familiae erciscundae, 413, 564 : an actio mixta, 266 : legata per praeceptionem enforced by, 568, 570.
— fiduciae, 61, 353, 373, 409 (1) : an actio bonae fidei, 62 : an actio in factum, 62 (14) ; *and see* 232 (3).
— finium regundorum, 413 : an actio mixta, 266.
— furti, 266, 417, 418 : not available as between husband and wife, 464.
— hypothecaria sive quasi Serviana, 261, 354, 356 (*and see* 268) : an actio arbitraria, 274.
— injuriarum, 422, 423 (cp. 286) : noxalis, 272.
— institoria, 222 (3), 430, 431, 433.
— judicati, 286, 289, 290.
— legati, 571, 572.
— legis Aquiliae, 419–21.
— locati, 404, 405 (*and see* 268).
— mandati, 407, 420 (4).
— metus, *see* Actio quod metus causa.
— negatoria, 327, 328, 346 : a real action, 264 : utilis 349.
— negotiorum gestorum, 412, 429.
— pignoraticia, 378 (*and see* 268).
— pro socio, 407.
— protutelae, 498.
— Publiciana, 328–30 (*and see* 311) : an actio ficticia, 260 : an actio arbitraria, 274 : form of the intentio in an, 260, 330 : used chiefly for the protection of ownership, 329, 336.
Actio Publiciana confessoria, 347.
— Publiciana negatoria, 329.
— quanti minoris, 400.
— quasi institoria, 431.
— quasi Serviana, *see* Actio hypothecaria.
— quod jussu, 430, 431, 433.
— quod metus causa, 209, 423 : an actio in rem scripta, 264 : an actio arbitraria, 274 : *see also* 268.
— rationibus distrahendis, 498.
— redhibitoria, 400 : *see also* 268, 272.
— rei uxoriae, 468, 469, 470, 471, 472.
— rerum amotarum, 464.
— rescissoria, 295.
— restitutoria, 295.
— Serviana, 261, 274, 354.
— spolii, 156.
— tributoria, 430.
— tutelae, 412, 498.
— venditi, 397, 402 : *see also* 432.
— vi bonorum raptorum, 419.
Actus, 342, 343.
Addictio, an acquisitio civilis, 310 (*and see* 57) : in a manumissio vindicta, 167, 481.
— in diem, 415, 416.
Aditio hereditatis, 521 : required from heredes extranei, 507, 510, but not from heredes domestici, 507, 508 : is irrevocable, 511 : *and see* Cretio.
Adjudicatio, an acquisitio civilis, 310, 413 : a derivative mode of acquisition, 315–16 : distinguished from a judgement, 316 : a mode of acquiring servitudes, 345.
Administrative Law, 26.
Adnotare, 547 (3).
Adnumerare, 305 (1).
Adoptio (Datio in adoptionem), a mode of acquiring patria potestas, 449, 479 : two kinds of, 479, 482, adoptio proper due to the interpretatio, 57 (7), 58 (cp. 480) : involves capitis deminutio minima, 181 : how transacted in the older law, 480, 481, and in the later Empire, 481 : adoptio plena and minus plena 481 : conferred rights of succession on the adoptive children, 509 (civil law), 531 (praetorian law), 536 (118th Novel) : women cannot adopt, 481 : wills originate in adoptions, 507, 542.
Adpromissor, 389.
Adscribere, 547 (3).
Adstipulatio, 389–90 : provision as to, in the lex Aquilia, 420 (4) : *and see* 438 (2).

Adventicia, *see* **Bona adventicia.**
Adversaria, 394 (1).
Aediles, Curule, Edict of the, 85, 86: aedilician actions, 400.
Aelius, Sextus, 90, 91: *see also* 75 (2).
Affinity, 451.
Affirmatores, 498.
Africanus, Caecilius, 98.
Agency, a form of **Representation** (q. v.), 220–2: processual agency, 425, 426: liability of principal for contracts of agent, 431: *and see* 463 and **Mandatum.**
Ager privatus, 35, 41.
— **publicus**, 44, 188, 310.
— **vectigalis**, 348.
Agnati, Agnatic Family, Agnatio, 180, 449, 450, 451, 459, 460: agnatio and cognatio distinguished, 450, 451: supersession of agnatio by cognatio, 450, 534, 535: a change of agnatic family involves capitis deminutio minima, 181: agnatic guardianship, 490, 491 (9), 492, 494: rights of succession of agnates on an intestacy, 530, 531 (civil law), 533 (praetorian law).
Agnitio (bonorum possessionis), 527.
Agreement, one of the elements of law, 31: defined, 205: either obligatory or real, *ibid.*: narrow conception of, in Roman law, 205 (1): in favour of a third party, 415: conferring a right of withdrawal, 415, 416.
Alaric II, Code of, 126, 127, 129, 130.
Album praetorium, 76.
Aliens, *see* **Peregrini.**
Alluvio, 323 (*and see* 404).
Alternative obligation, 366: cp. 379 (4).
Alveus derelictus, 323.
Analogy, Method of, 31, 32.
Anastasius, enactment as to succession of emancipati, 535.
Anatocismus, 384.
Animals, wild, are res nullius, 304, 317.
Animus domini (rem sibi habendi), 332, 333, 337: Savigny's theory of the, 332 (2): of an emphyteuta, 349.
— **donandi**, 212.
— **novandi**, 439.
Annus utilis, 283, 284.
Antichresis, 356.
Antoninus Pius, various laws of: 166 (protection of slaves), 461 (2) (right of divorce by a father), 465 (donationes mortis causa), 479, 480 (arrogatio of impuberes), 547 (bonorum possessio secundum tabulas).
Apostates, cannot be heirs, 566.
Appeals, development of system of 228 (5), 300.
Aquae ductus, 342, 343, *and see* 347.
Aquiliana, Stipulatio, *see next word.*
Aquilius, Gallus, formulae by, 436, 437 (for the stipulatio Aquiliana): 554 (for instituting certain postumi).
Arbitratus, Arbitrium, 271–4: *see* **Actio arbitraria.**
Arcadius and Theodosius, abolish cretio, 511.
Archon Basileus, 54 (4): functions of the Archon in the Attic law of succession, 519.
Argentarius (Banker), sues cum compensatione, 444 (8): correal rights and liabilities of argentarii socii, 360.
Arrogatio, 479, 480, 482, *and see* 41 (14): impubes arrogatus could insist on emancipation, 487: produced capitis deminutio minima, 181, 479: effect of, on the contractual debts of arrogatus, 181, 480 (2): effect of, not changed by Justinian, 481.
Assignatio, of ager publicus, 310.
Assignment, of obligations, 425–8: distinguished from novation, 428: of an hereditas, 510 (3).
Attic law of succession, 519–22, 552 (4), 556 (6).
Auctor, 312, 317, 318, 399 (1).
Auctoritas, of princeps, 92, : of tutor, *see next word*: of vendor, 50, 59 (10), 306, *and see* 398, 399.
Auctoritatis interpositio, of a tutor, 488, 489, 490, 491, 496: in the case of impuberes, 217 (cp. 489): in the case of women, 490, 491 (2): distinguished from gestio, 496.
Augustus, orders responsa to be given ex auctoritate principis, 92, 93: makes fideicommissa legally enforceable, 108, 570, 571: laws of, as to dos, 469: marriage legislation of, 478: establishes the rights of filiifamilias as to peculium castrense, 484.
Austrian Civil Code, 6.
Authenticae, 21, 137.
Authenticum (Liber Authenticorum), 21, 125.
Avulsio, 323.
Azo, 136.

B

Baden Landrecht, 6.
Baldus, 140, 141, 145 (9), 150, 151.
Banishment, 180.

Banker, *see* **Argentarius.**
Bankruptcy proceedings, 287 (3): in respect of a wife's antenuptial property, 462: in respect of the property of an arrogatus, 480 (2): a slave as heres necessarius must submit to, 510: *see also* **Bonorum emptor**; **Execution.**
Bartolus, 140, 141, 145 (9): on corporations, 148: on the conflict of laws, 148, 149: the central figure in the legal history of the Middle Ages, 150, 151.
Basilica, 132.
Beneficium abstinendi, 508, 528, note: a slave as heres necessarius has not the, 510.
— **competentiae**, 289.
— **divisionis**, 363: *see also* 105 (2), 385, note.
— **excussionis**, 385.
— **inventarii**, 561 (cp. 574).
— **ordinis**, 385.
— **separationis**, 561.
Bequests, 567 ff.: divided into **Legata** (q. v.), 567–70, and **Fideicommissa** (q. v.), 570, 571: assimilation of legata and fideicommissa by Justinian, 571, 572: restrictions on, 573–4: of servitudes, 345: bequests charged in the alternative, 360 (2).
Binubus, Parens, 477.
Blind persons, wills of, 549: cannot witness a will, 548 (14).
Bologna School of Glossators, 10, 135 ff.
Bona adventicia, 178, 485: *and see* 539.
— **adventicia irregularia**, 485.
— **castrensia** (**peculium castrense**), 178, 484, 485, 486, 539, 541: devolution of, 484, 539.
— **ereptoria**, 566.
— **materna**, 485.
— **materni generis**, 485.
— **paraphernalia**, 468.
— **quasi castrensia** (**peculium quasi castrense**), 178, 484, 485, 541: devolution of, 539.
— **vacantia**, 513.
Bona fides, the basis of informal transactions in the early law, 65: skill of Roman jurists in discovering the requirements of, 102, 103: Canon law as to, in prescription and limitation, 139: requires an error in substantia to be taken into account in certain cases, 211: an essential in usucapio, 320, 321, but not in usucapio pro herede, 320 (1), 517: *see also* **Negotia bonae fidei.**
Bona fide serviens, 172.
Bonae fidei possessor, 325, 327 (1): has juristic possession, 332.
Boncompagnus, 137 (5), 142 (4).
Bonitary ownership (**in bonis esse**), 82, 169, 311: protected by the actio Publiciana, 330 (cp. 311, 347).
Bonorum emtor, of a bankrupt estate, 288: sues cum deductione, 443: of an unclaimed estate, 531.
Bonorum possessio, opposed to hereditas as a form of hereditary succession, 515, 527, till Justinian, 538: theories as to the origin of, 515 ff.: original object of, 523, 528 (17): edict on, in Cicero's time, 518 (3), 526: became an independent system of succession, 527 (*and see* 88): could only be acquired by a judicial act, 527: within what time, had to be applied for, *ibid.* (*and see* 284 (3)): edictalis and decretalis, 527: how protected, 528: employed either juris civilis adjuvandi, or supplendi, or corrigendi gratia, 516, 523, 526, 528 (*for examples see* 532, 533, 547, *and* 534, 547, *and* 532, 547, 555 *respectively*): was either cum re or sine re, 528: delatio of, takes place on three grounds, 529 viz.:
(1) *ab intestato*, 531–4: four classes, unde liberi, 531–2: unde legitimi, 532–3 (*and see* 522 (12)): unde cognati, 533–4: unde vir et uxor, 464, 534.
(2) *secundum tabulas*, 546, 547.
(3) *contra tabulas*, 556, 558.
Bonorum venditio, *see* **Bonorum emtor**; **Execution.**
Booty of war, addictio of, 310 (cp. 317).
Breviarium Alarici, 126, 127, 129.
Brevi manu traditio, 312, 313.
Bulgarus, 135.
Bynkershoek, 151.
Byzantium, 132–3, 134.

C

Caducorum vindicatio, 478.
Caecilius Africanus, 98.
Caelibes, 'incapacity' of, 478, 566: *and see* 527 (16).
Canon Law, 3, 9, 138–40, 142, 143, 151, 156.
Capacity of Action, 216–19: *see also* 489–92, 541.
Capitis deminutio, 178–82: **maxima**, 178, 179, 182: **media**, 180, 182: **minima**, 180–1, 182 (*see also* 459, 479, 487): effect of (*a*) on contractual debts of capite minutus, 181, 447, 462, 480 (3); (*b*) on personal servi-

tudes, 181, 339, 341, 345, 346; (c) on civic honour, 182; (d) on patria potestas, 486, 487; (e) on guardianship, 499.
Capito, C. Atejus, 94, 95, 96, 104.
Captivi, as heredes, 198.
Captivity, effect of, 179 (cp. 167).
Caracalla, confers the Roman civitas on all citizens of the Empire, 46, 99 (11), 110, 114, 115, 174, 175, 395 (3), including Latini coloniarii, 175, but excluding dediticii, 174, and Latini Juniani, 175.
Cassiani, 94.
Cassius Longinus, 94.
Casus (Accident), 370, 439 (cp. 402, 406): effect of, under the lex Aquilia, 421.
Cato, M. Porcius, 90.
Caupo, 411, 425.
Causa civilis, necessary for a valid contract, 371.
— falsa non nocet, 209, 211.
— justa (traditionis), 313.
— lucrativa, 438, 439.
— omnis (accessions, &c.), 327.
— perpetua, in real servitudes, 342.
Causae cognitio, *see* Cognitio.
Cautio (memorandum), 382 (2), 395 (3).
— rei uxoriae, 468.
— rem pupilli salvam fore, 497.
— usuaria, 341.
— usufructuaria, 340, 342.
Celibacy, *see* Caelibes.
Celsus, P. Juventius, 97, 98, 99, 101.
Censor, 'nota' of, produces existimationis minutio, 183: checks abuse of patria potestas, 482.
Census, Manumission by, 167.
Centumviri, 227 (2): the legis actio survived in the court of the, 250, 515.
Centuriae, 41.
Cessio bonorum, 288.
Cessio, In jure, development of, by the interpretatio, 56, 57: for what purposes employed 57 (7): cannot be used by a filiusfamilias, 177 (1): cannot be performed by a representative, 221: an example of 'voluntary jurisdiction', 251: in jure cessio fiduciae causa, 63 (15), 409 (1): in jure cessio of an hereditas, 58 n., 510 (3); cp. 575 (1).
Charitable foundations, 196-200, 550.
Childlessness, 478, 566.
Children, status of, if mother a slave, 167: not born in wedlock, 451, 458, 479.
Chirographum, 395 (3).
Christianity, Law and, 23.
Cinus, 140, 141, 145 (9).
Citations, Law of, 118, 119, 123 (3).
Civil modes of acquisition, *see* Ownership.
— Procedure, *see* Roman Civil Procedure.
Civis, Civitas; civis defined, 173: cives and peregrini, 173-6: civitas extended to all Italian communities, 174, and to all citizens of the Empire, 110, 175 (*see* Caracalla): loss of civitas involves capitis deminutio media, 179, 180 (cp. 182).
Clan, *see* Gens.
Classical Jurisprudence, 97 ff.: *see* Jurisprudence, Roman.
Classici, Classis, 41.
Clausula Juliani, 532, (3), 533 (4).
Clementinae, 139 (1).
Clientela, Clientes, 38, 39, 172.
Code (Codex Justinianeus), 17: MSS. of the, 20, 21: compilation of the, 124, 125.
Codes, in modern Germany, 6: *and see* German Civil Code.
Codex, strict meaning of, 118 (1).
— accepti et expensi, 391, 392, 394, 395 (*and see* 119, note).
— constitutionum, 119, note.
— Gregorianus and Hermogenianus, 119 (note), 120, 121, 124, 128.
— juris enucleati, 119, note.
— Justinianeus, *see* Code.
— repetitae praelectionis, 124.
— Theodosianus, 119, note, 121, 124, 127 (4), 128, 129 (5).
Codicilli (codicil), 572: appointment of a tutor testamentarius by, 493: fideicommissa usually created by, 570: gift of a mortis causa donatio by, 578.
Codification, in modern Germany, 5 ff., 155: of Roman law, 52 (Twelve Tables), 121 ff. (Justinian).
Coëmtio (matrimonii causa), 453, 456, 457: ceremony of, 458: effect of, on wife's property, *see* Husband and Wife: how dissolved, 475, 477.
— (fiduciae causa), 63 (15), 491 (2).
Cognati (Cognatic Family, Cognatio), distinguished from agnati, &c., 180, 450, 451: gradual supersession of agnatio by cognatio, 450, 534, 535: cognatic guardianship under Justinian, 492: the 'cognati' in bonorum possessio, 533-4: degrees of cognati, 533.
Cognitio, the extraordinary procedure a procedure per cognitionem (causae cognitio), 108, 111, 112, 290: *and see* 295, 298.

Cognitor, 183 (3).
Co-heirs, solidary liability of, 503: accrual between, 506: operation of the vesting of the inheritance as against, 563, 564: *and see* 413.
Collateral relations, 451: intestate succession of, under Justinian, *see* Novel 118th.
Collatio, 564, 565: bonorum, 532, 564: dotis, 565: the Novels divided into 'collationes', 21, 138
Collegia, 187, 190, 199, 203.
Colonia Italica, 175 (2).
— Latina, *see* Latini coloniarii.
Colonus, 45, 172.
Comitia calata, 542.
— centuriata, 41.
— curiata, 35, 41: arrogatio in the, 479.
— tributa, 41 (15): *see also* 227 (3).
Commentators, 140 ff.: work out a jus commune for Italy, 143-4: apply scholastic methods to law, 146-8: their practical aims, 147, 148: nature of their work illustrated, 148, 149.
Commercial Treaties, 66 (cp. 173, 306).
Commercium, Jus commercii, 66, 173, 174, 176: granted to certain aliens by express treaty, *see preceding word*: liberti have the, 170, and filiifamilias, 177, and Latini, 174, but Latini Juniani only the commercium inter vivos, 175: testamenti factio passiva a necessary incident of the, 541.
Commodatum, 373, 375, 376, 381: distinguished from precarium, 335 (3).
Common Law of Germany, 3, 27, 155, 500, 550.
Communio, 413: *and see* Partition suit.
Compensatio (Set-off), 441-6 (*and see* 281): distinguished from deductio, 444 (8).
Complex relationship, 451.
Compromise (Transactio), a plea of, 276: gives rise to an actio praescriptis verbis, 381 (6).
Concubinatus, 457, 458.
Concursus causarum lucrativarum, 488.
Condemnatio, 258, 266-74: condemnatio pecuniaria, 267, 274, 286; its unfair operation illustrated, 267-70, how remedied by the praetor, 271-8: effect on the, of an exceptio doli for enforcing a counter-claim, 443, 444.
Condicio, in praesens vel praeteritum relata, 214.
— juris, 214, 521 (9).
Condicio potestativa, 554.
— tacita, 214.
— turpis, 214: *and see* Condition.
Condictio, *see* Legis actio per condictionem; literal meaning of, 234: when an actio stricti juris is called a, 265, 388: examples of the, 375, 388, 392.
— causa data causa non secuta, 409, 411.
— certae creditae pecuniae, 388 (6).
— certi, 388, 390 (cp. 270, 375, 392).
— ex injusta causa, 411.
— furtiva, 266, 410, 417, 419.
— incerti, 389, note.
— indebiti, 408, 411, 414.
— Juventiana, 376, 409 (2).
— ob causam datorum, 409.
— ob turpem causam, 410.
— propter poenitentiam, 409 (1).
— sine causa, 376, 409.
— triticaria, 388.
Condition, 213-14: a suus cannot be instituted or disinherited on a, 554.

Kinds of Conditions:

Condition, immoral, 214, 551.
— impossible, 214, 551.
— necessary, 214.
— resolutive, 213: an institution cannot be made subject to a, 550, except through a fideicommissum, 576.
— suspensive, 213, 550.
See also Condicio.
Conducere, literal meaning of, 405 (7).
Conductio, *see* Locatio conductio.
Confarreatio, Marriage by, 453, 456, 457: ceremony of, 458: how dissolved, 474, 477.
Confessio in jure (Confessus pro judicato est), 56, 57, 226, 251, 286 (cp. 236).
Confusio, a mode of extinguishing servitudes, 345, and obligations, 439: bonorum, 560.
Connubium (Jus connubii), 173, 174, 175, 176, 453: all Latini except Latini Juniani have, 175: liberti have, 170, and filiifamilias, 177: restricted by infamy, 185.
Consanguinei, 451.
Consensual Contracts, 372, 374, 396-408: how extinguished, 436: *and see* 379 (5).
Consensus, 31, 205, 372, 374, 396, 457: not sufficient to transfer ownership, 312.
— (nuptialis) facit nuptias, 457.
— sponsalicius, 457.
Consilium, of the magistrate, 171: of the emperors, 99.

Consobrini, 533.
Constantine, the imperial power monarchical in character since, 105, 113: *and see* 168 (manumissio in ecclesia), 356 (lex commissoria), 478 (caelibes and orbi), 484 (filiifamilias), 571 (legata).
Constitutional Law, 26.
Constitutiones, 106, 107, 124.
Constitutum debiti, 83, 416.
— **possessoridm**, 312, 313.
Consumable things, 304, 340.
Consumtio existimationis, 182.
Contract, defined, 205: restricted sense of, in Roman law, 371: oldest contracts originate in pledges, 64 (16): contracts in the old law, 372–4: four classes of, 372: liability on a, made by another, 428–33: contracts of a slave, 165 (1), 428–30: of a filiusfamilias, 177, 430: effect of capitis deminutio on a, *see* **Capitis deminutio**. *And see* **Agreement**; **Obligation**.
Contractus aestimatorius, 379 (4), 381 (6).
Contrarius actus, a mode of extinguishing obligations ipso jure, 434–6, 44 0 application of the principle of, in the law of marriage, 474, and in the old law of inheritance, 524.
Contubernium, 458.
Conventio in manum, 181: *see* **Manus**.
Corporations, 195 ff.: distinguished from partnerships, 202–3.
Corpus juris civilis, 13, 16–18: MSS. of the, 19 ff.: sums up the whole development of Roman law, 114, 123: how compiled, 121–5: rivalry of the, with the Breviarium Alarici, 129, 130.
— **canonici**, 3, 138–40
Correal obligation, Correality, 359 ff.: examples of, 359 (*see* 385, 389, 390, 416): correal creditor distinguished from solutionis causa adjectus, 438 (3).
Credit, transactions based on, developed by the interpretatio, 63: how personal, becomes possible, 505.
Cretio, defined, 512: how carried out, 512, 521: required from a heres extraneus in the old law, 516, 520, 521, 526, not from a suus heres, 520 (6): no limit of time for, in the old law, 511, 524: when required from a heres extraneus in the classical law, 511, 512: literal meaning of, 521 (11): cretio vulgaris and continua, 512: abolition of, 511.
Criminal Law, 26: books in the Digest on, 124 (11).
Cujacius, 151.
Culpa (Negligence), levis and lata, 368, 420: levis in faciendo and in non faciendo (culpa Aquilia), 368 (3): in concreto, 369: liability for, and dolus distinguished, 424: *see* **Diligentia**.
Cura, Curator, cura a form of **Guardianship** (q. v.), 488: distinguished from tutela, 488, 489: three cases of, 489: cura minorum, 217, 218, 489, 490: curi furiosi and prodigi, 492, 494, 499: special cases of cura, 492; curators how appointed, 494: curator bonorum (in bankruptcy), 287 (3).
Curia, 35.
Customary law, 26, 54: the magistrate not bound by, 54, 88, otherwise the judex, 228 (4).

D

Damage, to property in the wider sense, *see* **Dolus**: to corporeal property, 419–21.
Damages, liability of parties for, in bonae fidei negotia, 369, 370: measure of, 369: measure of, under the lex Aquilia, 419, 420, 421.
Damnum infectum, pignoris capio in cases of, 237: the legis actio survived in proceedings as to, 251 (12), 252.
Damnum injuria datum, 419–21.
Dare, meaning of, as the object of an obligation, 367 (cp. 567).
— **ex injusta causa**, 410.
— **ob causam**, 408, 409.
— **ob turpem causam**, 410.
Datio in solutum, 438.
Deaf persons, cannot witness a will, 548 (10).
Decemviri, *see* **Twelve Tables**.
— **stlitibus judicandis**, function of the, 227 (3): abolished by Augustus, 250 (12).
Decreta principis, 105, 107, 108, 113.
Decretum, distinguished from sententia in Roman procedure, 227, 228, *and see* 290; the distinction disappears in the later procedure, 299.
— **divi Marci**, 105 (2), 225.
— **Gratiani**, 139 (1).
Decuriones, 175 (2).
Dediticii, 67, 171, 173, 174, 175, 176:

certain slaves become, on manumission, 171 : law as to the devolution of the property of certain, 85 (1) : cease to exist under Justinian, 175 : *and see* **Caracalla.**
Deductio, a bonorum emtor sues cum deductione, 443 : distinguished from compensatio, 444 (5).
— (exagoge), by a suus heres, 519.
— in domum, 457.
— quae moribus fit, 255 (3).
— servitutis, 343 (1).
Defensor, 483.
Delatio bonorum possessionis, 529.
Delatio hereditatis, 506, 566.
Delegare, Delegation, 386.
Delicts, opposed to contracts, 371 : the private delicts, 417 ff. : actiones ex delicto, 266 : of slaves and filiifamilias, 425 (cp. 165 (1), 512).
Delictual capacity, 219.
Demonstratio (part of the formula), in bonae fidei actions, 265 : in an actio in factum civilis, 259 n., 380 : in the actio ex stipulatu, 388 (6).
Deportation, 180 (1).
Depositum, 376–8 : irregulare, 377 : *see also* Actio depositi.
Derelictio, 317 : of a slave, 167.
Derivative Acquisition, 312–16 : *see* Ownership.
Detention, 331.
Dharma, 22 (2).
Dicta et promissa, 400.
Dies, 214, 215 : an heir cannot be instituted subject to a, 550, 551, except through a universal fideicommissum, 576 : gift of the statutory share not to be limited by a, 557.
— fasti and nefasti, 88.
— legati venit, 315.
— utiles, *see* Tempus utile.
Diffarreatio, 474, 477.
Digest (Pandects), 17 : MSS. of the, 19, 20 : how compiled, 122–4 : writings of Ulpian and Paulus in the, 100, 123 (3).
Diligentia, required in bonae fidei negotia, 368, 369 : instances where omnis diligentia is required : 325 (bonae fidei possessor), 376 (commodatarius), 377 (depositor), 378 (pignus), 404 (locatio conductio, *see also* 376 (1)), 407 (mandatum), 411 (negotiorum gestor) : instances of the diligentia quam suis rebus etc. : 369, 406 (socius), 369, 413 (co-owners), 369, 412, 497 (guardian), 369, 467, (husband as to res dotales).
Diocletian, grants of the jus respondendi occur under, 101 (16), but not after, 117 : with, the imperial power becomes monarchical and the administration bureaucratic, 111, 112, 113, 297 : on the delegation of causes to a judex pedaneus, 299 : on laesio enormis, 403 : on adoption by women, 481.
Disinherison, *see* Exheredatio.
Distraint, *see* Pignoris capio.
Divisible things, 305 : *and see* 315, 564.
Divorce, 474–7.
Doli capax, 219.
Dolus (Fraud), 423, 424 : liability for, and culpa distinguished, 424 : does not affect the validity of juristic acts by the civil law, 82, 84, 209, 210, 276 : praetorian remedies against, 210 : liability for, in bonae fidei negotia, 368, 369 (*and see* 376, 377) : on part of vendor, 400.
— malus, definition of, due to Labeo, 94.
Dominica potestas, 166, 510.
Dominium ex jure Quiritium, *see* Ownership.
— revocabile, 213.
Dominus litis, 426.
— negotii, 222, 223, 411, 431, 432.
Donatio inter vivos (Gift), 211, 212 : an insinuatio required if the, exceeds 500 solidi, 212, 277, 416 : a promise of a, a pactum legitimum, 416 : of ward's property by a guardian, 496 : inofficiosa donatio, 558.
— ante nuptias, 473, 474, 476.
— inter virum et uxorem, is void, 212, 464, 473.
— mortis causa, 206, 212 : treated in many respects like a legacy, 212, 464 (1), 578 : a form of mortis causa capio, 578 : valid as between husband and wife, 464 (1), 465.
— propter nuptias, 473, 474, 476.
Donellus, 151.
Dorotheus, 122.
Dos, 465 ff. : object and nature of, 465 : who can demand a, 466 : kinds of : adventicia, 466, 470, 472 ; profecticia, 466, 470, 472 : recepticia, 466, 470 : how created (dotis datio, dictio, promissio), 466, 472 : a promise of a, a pactum legitimum, 416, (cp. 466) : history of the wife's right to recover the, 468–71 (*and see* 476) : inofficiosa dos, 558 : dotis collatio, 565.
Do ut des, do ut facias, 379, 382.
Ductio, 483.
Dumb persons, cannot witness a will, 548 (10).
Duplicatio, 281.

E

Ecclesiastical law, 26.
Edict of the Praetor, 74 ff. : nature of the, in the early times, 75, 76 : influence of the, over legal procedure, 78, 79, 80, 257 : gives effect to the jus aequum, 80 : decline of the, 84, 85 : final revision of the, 86, 107, 112 (*and see* 297) : contents of the, illustrated, 87, 88.
Edictum de conjungendis cum emancipato liberis ejus, 532.
— **Hadrianum (Julianum)**, 84-8 ; its arrangement, 75 (2), 76 (3) : its contents referable to public law, 86 (4) (cp. 277).
— **novum**, 77.
— **perpetuum**, 77.
— **principis**, 105, 106, 107 : in the sense of an imperial statute, 112, 120.
— **provinciale**, 86.
— **successorium**, 534.
— **Theodorici**, 126, 127.
— **tralaticium**, 77, 84.
Emancipatio, developed by the interpretatio, 57 (7), 58 : produces capitis deminutio minima, 181, 487, 488 : extinguishes patria potestas, 486 : Anastasiana, Justiniana, 486 : Saxonica, 487.
Emancipatus, succession to an, by the civil law, 531 : not a suus heres, 509 : his rights of intestate succession by the praetorian law, 531, 532, 533 : collatio by an, 532, 564.
Emblemata Triboniani, 123.
Emphyteusis, 348-50 : distinguished from servitudes, 350.
Emtio venditio (Sale), 396 ff. : distinguished from exchange, 396 (1) : speciei, generis, 400, 402 : periculum in, 401, 402, 403, 404 : transfer of ownership in, 313, 403.
Enrichment ex injusta causa, 408, 410, 411.
— **sine causa**, 408, 409, 410.
Ephemeris, 394 (1).
Epistola, a form of rescript, 105, 107 : manumission per epistolam, 169.
Epitome Juliani, 21.
Equity, and Law, 28 : development of, in Rome, 72.
Error, in substantia, 210-11 : distinguished from error in corpore, 210 : a ground of in integrum restitutio, 296.
Esse in libertate, 172.
Eviction, landlord's right of, 349 : vendor must warrant purchaser against, 398, 399.
Exagoge, 519.
Exceptio, 275 ff., 443 (7) : 'civil' exceptiones, 277 (*and see* 254 (2)) : effect of an, in an actio in factum concepta, 278, 279 : dilatory and peremptory exceptiones, 281, 282 : extinguishing an obligation ope exceptionis, 433, 440 ff.
— **dilatoria**, 281, 282.
— **divisionis**, 363, 385.
— **doli**, 210, 276, 279-81, 282 : generalis and specialis, 279, 280 : used to give effect to a counter-claim, 281, 442, 443, 446.
— **dominii**, 328 (cp. 330), 347.
— **jurisjurandi**, 276.
— **legis Cinciae**, 277.
— **legis Plaetoriae**, 277.
— **metus**, 209, 276, 282.
— **non adimpleti contractus**, 397.
— **pacti de non petendo**, 276, 440.
— **peremtoria**, 281, 282.
— **perpetua**, 281.
— **praejudicii**, 563, 562 (1).
— **procuratoria**, 282 (*and see* 281).
— **quod metus causa**, 209 : cp. 276, 282.
— **rei judicatae vel in judicium deductae**, 254, 285, 286, 316 : gives effect to a judgement in a correal obligation, 363.
— **rei venditae et traditae**, 310.
— **SC[1]. Macedoniani**, 277, 375.
— **SC[1]. Vellejani**, 277, 386.
— **solutionis**, 278.
— **temporalis**, 282.
— **transactionis**, 276.
— **vitiosae possessionis**, 336.
Exchange, 379 : distinguished from sale, 366, 396 (1) : how enforceable, 409.
Excusationes of guardians, 495, 499.
Execution, 286-9 : rigour of, in the early law (manus injectio), 51, 372 : gives rise to the L. A. per manus injectionem, 234-6 : judicial execution, meaning of, 234, 235 : when available, 235, 236, 267, 271 : execution in actiones arbitrariae, 271 : always personal in the early law, 51, 286, 287, 372 : real execution (missio in bona, venditio bonorum) due to the praetor, 287, 288 : effects of the praetorian execution (bankruptcy), 288 : cessio bonorum, 288 : 'special' execution (pignus in causa judicati captum), 289 : in the later Empire, 300.
Exercitor, 430, 433.
Exheredatio (Disinherison), rules of, in the civil law, 553-5 : in the prae-

torian law, 555–6 : under Justinian, 559 : nominatim and inter ceteros, 553, 555 : of postumi, 555.
Existimatio (Civic honour), 182–5 : *see* **Infamia.**
Expensilatio, 391–5 (*and see* 374) : *see* **Literal Contract.**
Expositio, 135.
Expromamissio, 386.
Extraordinary Procedure (**Procedure per cognitionem**), nature of the, 289, 290 : what matters dealt with by the, 290, 291, 483 : development of the, in the Empire, 298–300 : employed by the emperors, 108, 109, and their delegates, 111 : *see also* **Cognitio.**

F

Facere, meaning of, as the object of an obligation, 367 (cp. 388, 567).
Facio ut des, facio ut facias, 379, 382.
Falsa causa non nocet, 209, 211.
Familiae emtor, in the mancipatory will, 542, 543, 544 : becomes a mere witness, 544, 546, 547.
Family, conception of, in the jus civile (agnatio), 180, 449, 459, 460, 461, and in the jus gentium (cognatio), 450, 461 : constituent members of a, 451, 452.
— **Law of the**, 25, 26, 448 ff. : place of the, in the legal system, 158, 159, 160 : applied and pure family law, 159, 160, 448.
— **power**, nature of, 448 : rigour of, in the early law, 52.
— **trusts**, 3, 4.
Fas, 22 (3), 54 (4).
Ferruminatio, 326.
Fictio legis Corneliae, 179.
Fictions, in Roman procedure, *see* **Actio ficticia** : fiction of insanity, 556 (6).
Fideicommissarius, 570.
Fideicommissum, a creation of the imperial jurisdictio, 108, 109 : its nature and characteristics, 570–1 : assimilation of legata and fideicommissa, 571–2 : fideicommissaria libertas, 168 : universal fideicommissum, 574–7 (*and see* 109).
— **a debitore relictum**, 415, 572 (3).
— **orale**, 572.
Fidejussio (**Suretyship**), 384–6 : creates a correal obligation, 359, 385 : contrasted with constitutum debiti, 416, and with older forms of suretyship, 384 (3) : in a naturalis obligatio servi, 165 (1) : in the case of an hereditas jacens, 515.
Fideprommissio, 384 (3).
Fiducia (**Mancipatio fiduciae causa**), 60–4 : cum amico contracta, 60, 373, 409 (1) : cum creditore contracta, 60 (cp. 352, 353) : enforceable by **Actio fiduciae** (q. v.) : could not be created by traditio, 63 (15), 344 (1) : contrasted with a manicipatory will, 62 (13), 543.
— (in the sense of the thing mancipated fiduciae causa), 320 (1).
Fiduciarius, 570.
Fiduciary Ownership, 63 (15) : cp. 320 (1).
Filiusfamilias, legal meaning of, 177 : position of, in public law, *ibid.* : proprietary capacity of, 177 : gradual development of full proprietary capacity of, 178, 484–5, 539 : liability of paterfamilias for contracts of filiusfamilias, 430, 485, and for his delicts, 425, 483 : involuntary representation by, 223 (cp. 177, 221), 484 : loans of money to a, 375 : adstipulatio by a, 389 : testamentary capacity of a, 541 : *and see* **Patria potestas.**
— **miles**, privileges of a, 484, *and see* **Soldier.**
Fiscus, a juristic person, 190 : charitable foundations regarded as portions of the, 196 : hypotheca of the, 355, 357 : takes bona vacantia, 513 : claim of the, to bona ereptoria, 566, *and* cp. 478.
Flamen Dialis, 486.
Flavius, 89, 91 : cp. 75 (2).
Foenus, *see* **Interest.**
Folk-land, 187.
Foreclosure clause, 356.
Foreigners, *see* **Peregrini.**
Foreign trade, its importance in Roman legal history, 65 ff.
Formula, 78, 244 : serves as a litis contestatio in the court of the praetor peregrinus, 244, 253–6 : through the, the praetor dominates the development of civil law and procedure, 256–7 : parts of the, 257 ff. : in jus and in factum concepta, 262, 263.
Formulary procedure, 78 : origin and development of the, 243 ff. : was the procedure of the jus honorarium and the jus gentium, 245 : became a civil procedure, 246–8 : importance of the, in the development of Roman law, 257 : falls into disuse, 299 : finally abolished, 300.
Foundations, as juristic persons, 195 ff. : in the technical and non-

technical sense, 197 : in modern German law, 200.
Fragmenta, in the Corpus juris, 17.
— **Vaticana**, 120 (2).
Fraud, *see* **Dolus**.
Freedman, *see* **Libertus**.
French Civil Code, 6.
Fructus, 325, 327 (1) : *and see* 340, 341, 349, 568.
Fundus dotalis, 467.
— **Italicus**, privileges of, 175 (2) : a res mancipi, 69, 306, 307 : forming part of a dos, 467.
— **provincialis**, 307, 319, 320, 344.
Fur manifestus, 417, 418 (cp. 234 (9)).
Furiosus (Lunatic), has no capacity of action, 216, 217 (cp. 541, 548 (10)), nor delictual capacity, 219 : cura of a, 489, 492.
Furtum (Theft), 417–19 : quasi-contractual liability of a thief, 410 : husband and wife cannot sue one another for, 464.
— **possessionis**, usus, 418.

G

Gajus, 98 : authority of, 117 : writings of, in the Law of Citations, 118, 119 : Justinian's Institutes founded in the main on, 122 : Gothic epitome of, 128.
Gens (Clan), **Gentilis**, 34 ff., 451 : the gentiles' rights of intestate succession, 36, 530, 531, 533.
Genus perire non censetur, 365.
German Civil Code, 7, 8, 10 ff., 157. References to particular Sections of the Code:
§ 1 (capacity to have rights), 164 : §§ 21, 22 (societies), 202 : § 54 (societies not incorporated), 203 : § 80 (foundations), 200 : §§ 106, 107 (minors), 218 : § 114 (imbeciles, &c.), 218 : § 242 (good faith in obligations), 371 : §§ 823, 433 ff., 446, 447, 480 (sale), 398, 401, 403 : § 328 ff. (agreements in favour of a third party), 415 : § 611 ff. (contracts of service), 109 (3) : §§ 752, 753 (partition), 316 (4) : § 823 (negligent damage), 424 : § 1626 (parental power), 487 : § 1923 (succession of a child *en ventre sa mere*), 164 : § 2100 ff. (Nacherben), 577 : § 2174 (legacy), 316 (5), 572 (2).
— **Law**, struggle of, with Roman law in the Middle Ages, 152–5.
— **Private Law**, 4, 155.
Germani, 451.
Gestio, of a guardian, 488, 489, 495 : distinguished from auctoritas, 496.
Gift, *see* **Donatio**.
Glossa ordinaria, 137.
Glossators, 10, 125, 129, 135–8 : their attitude towards Lombard and Roman law, 142.
Gothofredus, 22.
Gratianus, 139 (1).
Greek Law, attempt to suppress, during the Empire, 110, 115 : antithesis between Roman and, 112 : strength of, 115, 116.
Guardians, how appointed, 492–4 : qualifications of, 494 : women as guardians, 494 : effect of the appointment on, 494, 495 : excusationes of, 495 : the special power of, 495, 496 : (cp. 217) : powers of joint guardians, 496 : duties of, 497–8 : the obligation of joint guardians is solidary, 361 (4), 498 : remedies against, 498 : removal of, 499 : controlled by the State as guardian-in-chief, 499, 500 : *and see next word*.
Guardianship, place of the law of, in Family Law, 448 : two kinds of, 488, 489, *see* **Cura**; **Tutela** : of minors, two stages of, 489–90 (*and see* 216–18) : a munus publicum (officium), 495 (cp. 58 note) : creates a quasi-contractual obligation, 412 : termination of, 499 : *see also preceding word*.

H

Habitatio, 341 : not extinguished by non usus or capitis deminutio minima, 346.
Hadrian, consolidates the Edict, 85, 86, 297 : rescript on the collections of responsa, 93 : epistola on the beneficium divisionis, 105 (2), 368, 385 : his practical abolition of usucapio pro herede, 518 (2), (cp. 562) : divers practices commencing about the reign of, 87 (5), 105 (2), 106 (3), 107, 175 (2).
Half-blood, Relations of the, *see* **Collateral relations**.
Harmenopulos, 132.
Heir, *see* **Heres**.
Hereditas, defined and distinguished from bonorum possessio, 515, 527 : delatio and acquisitio of an, 506 ff. : assignment of an, 510 (3) : repudiatio of an, 511, 524 : usucapio pro herede originally a usucapio of the, 516 : a fideicommissum of an, 574–7 : *and see* **Succession**.
— **jacens**, 512–14.
— **legitima**, assignable, 58 n., 510 (3) :

of a mother in respect of her intestate children, 535.
Hereditatis petitio, 562, 563, 565 cp. 268) : a real action, 264 : *and see* 250.
— — fideicommissaria, 576.
— — possessoria, 528, 555, 563 (cp. 566).
— vindicatio, 227 (3).
Heredium, 35.
Heres (Heir), quasi-contractual liability of the, 414 : a universal successor, 503, 560 (*see* Succession) : heres domesticus and extraneus, 507 : intestacy heirs, 530 ff. : testamentary heirs, 540 ff. : heirs by necessity, 553 ff. : liability of the heir for the debts of the deceased, 504, 560 : inability to become heir, and 'incapacity', 566 : *and see* Institution.
— domesticus, 507 : succeeds ipso jure, *ibid.* : either a suus et necessarius, 507–9, or a necessarius, 509 : a slave as heres necessarius, 510.
— extraneus (voluntarius), 507, 510–12 : must expressly take possession of the inheritance (aditio), 507, 510, 512, 520, 521, 523.
Heretics, disqualification of, 566.
Hexabiblos, 132, 133.
High Treason, disqualification of children of persons guilty of, 566.
Hire, *see* Locatio conductio.
History of Roman law, as a branch of legal study in Germany, 8, 9, 13, 14.
Honorarium, not legally recoverable till the Empire, 109.
Honorius and Theodosius, on the limitation of actions, 283.
Honour, Civic, 182.
Horotus, 35.
Hostile property, 317.
Hostis, original meaning of, 173 (1).
Hotchpot, 532, 564, 565.
Hugo, (Glossator) 136, (German jurist) 155 (5).
Husband and Wife, proprietary relations between, 462–5, in marriages with manus, 459, 462, 463, and in marriages without manus, 463 : mutual gifts between, 212, 464, 473 : wife entitled to maintenance, 464 : cannot sue one another for theft, 464 : *see also* Dos : rights of succession as between (apart from manus), 464, 534, 538, 540 : wife's privileged hypotheca, 471, 473.
Hyperocha, 356, 357, 378.
Hypotheca, 354, 355 (cp. 60) : privileged, of fiscus, 355, 357, of wife, 471, 473, and of ward, 497.

I

Ideal parts, meaning of, 305.
Immiscere, 508.
Impensae (Expenses), husband's retainer of, 469, 471 : rights of a precario habens in regard to, 335 (3) : of a bona fide possessor of an estate, 563 : *and* cp. 377, 378, 407, 412, 413.
Imperial legislation, 112 ff.
Imperium, as opposed to jurisdictio, 76 (3) : enabled the praetor to work out the formulary procedure, 242–4, 246, 248 : is given free play in the Extraordinary Procedure (q. v.), 290–1.
Impetrare actionem, 299.
Impetratio dominii, 356.
Implantatio, 323.
Impossibility of Performance, 439.
Imprudentia judicis, 424.
Impubes, has imperfect capacity of action, 216, 217 : has delictual capacity, 219 : arrogatio of an, 479, 480, 487 : cannot make a will, 541, nor witness a will, 548 (10) : tutela of an, 217, 489.
Inability to become heir, 566.
Inaedificatio, 323.
In bonis esse, *see* Bonitary ownership.
Incapacity, technical meaning of, 566 : of caelibes and orbi, 478, 566.
Incertae personae, examples of, 188 (1), 550, 551, 554 : rule as to institution of, as heirs, 550.
In diem addictio, 415, 416.
Infamia, meaning of, 183 : mediata or immediata, 184 : effects of, 184, 185 (*and* cp. 557, 560) : edict on, 185 : particular instances where it attached, 288, 289 (missio in bona), 353 (actio fiduciae), 423 (actio de dolo), 477 (re-marriage of widow within a year), 499 (misconduct of guardian), *and see* 62 (12).
Infans, has no capacity of action, 216, nor delictual capacity, 219, but has proprietary capacity, 218 : guardianship of an, 489.
Inference, Method of, in Jurisprudence, 30, 32.
In fraudem legis, proceedings, 30.
Ingenuus, 170.
Ingratitude, examples of legal effects of, 212, 560.
Inheritance, the law of, 501 ff. : place of the law of, in the legal system, 159, 160 : assignment of an, 510 (3) : sale of an, 575.
In integrum restitutio, 294–6 : resti-

tutio minorum, 295 : restitutio majorum, 296 : propter absentiam, 296 (edict on, 87, 88) : propter dolum, 210, 296 : propter metum, 209, 296 : propter errorem, 296 : in relief of creditors against the civil law effects of capitis deminutio minima, 181, 447, 480 (2).
In jure cessio, *see* Cessio.
Injuria, 422–3 : when a libertus could sue his patron for, 171 : *and see* 269, 273.
In jus vocatio, 234 (3) : *and see* 258, 262.
In libertate esse, 172.
Innkeeper, 411, 425.
Innominate real contracts, 378–81, 409.
Inofficiosa donatio sive dos, inofficiosum testamentum, *see* s.v. Querela.
Insinuatio, certain gifts require, 212, 416 : mortis causa donationes do not require, 578.
Institor, 430, 431, 433.
Institutes of Justinian, 16, 122 : MSS. of the, 20.
— as a branch of legal study in Germany, 8–10, 13, 14.
Institution, of an heir in a will, 541, 545, 550, 551 : who can and who cannot be instituted, 541, 550 (cp. 566) : effect of conditions annexed to an, 550, 551 : of postumi, 554, 555 : of a slave, 510 : dispositions preceding the, void, 545 : universal fideicommissum an informal, 576, 577.
Institutions, as juristic persons, 195 ff.
Insula nata, 323, 324.
Intentio, 258–62 : in jus and in factum concepta, 258 : modification of the, in an actio utilis, 259–61, and in an Actio fictitia (q.v.), 259–60 : importance of the, in the classification of actions, 262 : in personam and in rem, 263, 264 : incerta, 265.
Intercessio, 385, 386 : of women, 277, 385.
Intercession (Jus intercedendi), of coordinate or superior magistrates, 77 (4), 228 (5) : of the emperor, 85.
Interdictum, in the wider sense, 290 : what matters dealt with by, 290, 291 : in the narrower sense, 291–3 (*and see* 75, 228) : examples of interdicts, 294 : used for the protection of servitudes, 347.
— adipiscendae possessionis, 528, 565.
— de aqua, de fonte, de itinere, 347, 348.
— de liberis ducendis item exhibendis, 461 (2), 483.
Interdictum de precario, 291, 334–6 : form of, 294.
— de superficie, 351.
— de uxore exhibenda ac ducenda, 461, 462.
— duplex, 334.
— exhibitorium, 292 (4), 293.
— possessorium, 333–6 : available by an emphyteuta, 349, and by a pledgee, 356.
— prohibitorium, 292 (4), 293.
— quorum bonorum, 264, 528, 555, 563, 565.
— recuperandae possessionis, 334, 336.
— restitutorium, 292 (4), 293.
— retinendae possessionis, 333, 336.
— Salvianum, 354.
— unde vi, 334–6.
— utile, 347.
— uti possidetis, 333, 334, 335, 336 : form of, 294.
—utrubi, 333 (5).
Interest (Foenus, Usurae), Canon law as to, 139 : payable for mora, 370 : mutuum does not bind the borrower to pay, 373, 375 : stipulatio for payment of, 375, 383, 384 : how calculated, 383 : rates of, allowed, 383.
— (quanti ea res est), meaning of, 369 : cp. 268, 270, 388, 399.
Interlocutiones, 105.
International Law, 26.
Interpellatio, 370.
Interpolations, in the Digest, 123 : in the Code, 124.
Interpretatio, followed the decemviral legislation, 55 ff., 89 : develops in jure cessio, 56, 57, and emancipatio, 58 : converts mancipatio into a general mode of conveyance, 58–60 : works out the mancipatio fiduciae causa, 60–62 : results of the, 63 : required bona fides in usucapio, 320 (1).
Interpretation, logical and grammatical, 28–30 : authentic, 105.
Interrogatio in jure, 511.
Intestate succession, at first the only kind of succession, 502 : operates a delatio hereditatis, 506 : intestate and testamentary succession mutually exclusive, 506 : order of, by the XII Tables, 519, 530, 531 : order of, by the praetorian edict, 531–4 (*see* Bonorum possessio ab intestato) : growing recognition of the cognatic principle in, 535 : order of, under Justinian, 536–9.
Intimidation, *see* Metus.
Invecta et illata, hypotheca of, 261, 354, 355.

Inventory, 561, 574.
Irnerius, 135, 136, 150.
Iter, 342, 343.

J

Jacobus, 135.
Jhering, 11, 29 (1), 31, 34 (1), 157.
Judex, original character and functions of, 78, 227, 228: bound by customary law, 228 (4): his relations to the praetor, how affected by the formula, 256, 257: becomes an official, 257.
— datus, delegatus, 298.
— pedaneus, 298, 299.
— qui litem suum facit, 424.
Judgement, meaning of, in the earlier procedure, *see* Sententia: legal effect of a, 286: contrasted with adjudicatio, 316: effect of, in a correal obligation, 363.
— debtor (Judicatus), liable to immediate manus injectio, 234 (9), 235: could be released by nexi liberatio, 434, 435: cp. Confessio in jure.
Judicatus, *see* Judgement debtor.
Judicis postulatio, Legis actio by, 231, 232, 239 (16): cp. 62 (11).
Judicium, meaning of, in the classical procedure, 227, 229, 230.
— divisorium, *see* Partition suit.
— duplex, 334, 413.
— imperio continens, the formulary procedure at first a, 244, but not so in all cases after the lex Aebutia, 248: necessity for the exceptio rei judicatae in a, 254.
— legitimum, 247: effect of the formula in a, after the lex Aebutia, 254: *see also* 310, 345.
— propinquorum, 459 (cp. 482).
— rescindens and rescissorium, 295.
Julian (Emperor), on governor's powers of delegation, 299.
Julianus, Salvius, consolidates the Edict, 85: his works and position in Roman jurisprudence, 97, 98, 99, 101: nova clausula Juliani, 532 (3), 533 (4).
Julianus, professor in Constantinople, 21.
Jura in re (aliena), 337 ff.: *and see* 309.
Jurisdictio, distinguished from imperium, 76 (3).
Jurisprudence, 28 ff.: practical function of, 28–32: ideal function of, 32, 33.
Jurisprudence, Roman, 88 ff.: at first controlled by the pontifices, 88–91: passes into the hands of laymen, 92, 93; the Responsa prudentium (q.v.) 92, 93: schools of law (Sabinians and Proculians), 94–8 (cp. 324): classical Roman jurisprudence, 97–101: its achievements, 101–4.
Juristic acts, 204 ff.: defined, 204: kinds of, 205, 206: requisites of, 206–8: nullity of, 208: motive as affecting, 208–12: qualifications of, 213–15: capacity for, 216–19: conclusion of, by a representative, 219–23.
— literature, authority of, in Rome, 117, 118.
— person, 186 ff.: defined, 161: its property is public or social property, 162, 186: conception of a, unknown in mediaeval German law and in early Roman law, 187–9: developed during the Empire, 189–90: the precise nature of a, 190–3: are juristic persons real or fictitious? 193 note: kinds of juristic persons, 195 ff.: great importance of the, in modern law, 201: whether an hereditas jacens is a, 513: testamenti factio passiva of a, 541, 550.
— possession, *see* Possession.
Jus, opposed to fas, 22 (2): opposed to leges in the later Empire, 116, 117: meaning of, in the classical procedure, 225, 226, 229: *and see* Law.
— accrescendi, 506, 552, 554, 556.
— Aelianum, 75 (2), 89, 91.
— aequum, opposed to jus strictum, 28, 71: takes shape in the praetorian edict, 80: attains to maturity, 116.
— aureorum anulorum, 170.
— civile, what it was, 47, 48, 70 (*see* Civis): codified in the XII Tables, 48 ff.: its rivalry with the jus gentium, 46, 65 ff., 70–2: narrower senses of the word, 56 (5), 73 (2), 80 (3): opposed to jus honorarium, 80 ff., till the Empire, 111, 112, 114: finally displaced by the jus gentium, 115: originally only a law for the individual, 191, 192.
— commercii, *see* Commercium.
— commune, an absolute rule of law, 27: the common law, 142.
— connubii, *see* Connubium.
— extraordinarium, 109.
— Flavianum, 75 (2), 89, 91.
— gentium, 46, 47: how incorporated in Roman law, 64–9: compared with the jus civile, 70–3: administered and developed by the praetor peregrinus, 78–80, and further developed by the jurists, 103, 104: final victory of the, 116: *and see* Peregrini.

Jus honorarium, 80, 81, 87 : its development results in a dual system of law, 81–4 : imperial type of, 110 : influence of the, on the development of Roman law, 256–7.
— **honorum**, 170, 174 : extinguished by infamy, 185.
— **in agro vectigali**, 348.
— **intercedendi**, *see* **Intercession**.
— **Italicum**, 175 (2).
— **Latii**, 110.
— **legitimum**; 56 (5).
— **novum**, in the Empire, 116.
— **Papirianum**, 54 (4).
— **perpetuum**, 348.
— **poenitendi**, 409.
— **postliminii**, 179 : as to hostile property, 317.
— **postulandi**, 183 : cp. 185.
— **protimiseos**, 349.
— **publicum**, 26 : in the sense of absolute law, 27.
— **respondendi**, *see* **Responsa**.
— **sacrum**, controlled by the pontifices, 88 : position of slaves in the, 166 : governs the relations of patron and client, 172 : not a law for the individual, 189 : correal obligations originated within the, 360 (2) : diffarreatio governed by the, 475.
— **singulare**, 28, 294.
— **strictum**, opposed to jus aequum, 28, 80 : formed the essence of early Roman law, 44.
— **suffragii**, 174 (*and see* 169) : extinguished by infamy, 185.
— **tollendi**, 335 (1).
— **tripertitum**, 549.
— **trium vel quatuor liberorum**, 478, 585.
— **vetus** (jurist-made law), opposed to jus novum (leges, imperial law), 116 ff.
— **vitae ac necis**, of paterfamilias, 482, 483, *and see* 52 (of husband, cp. 459).
Jusjurandum in litem, 271.
Justa causa (traditionis), 314.
Justice, 22 : *and see* 29 (1).
Justinian, legal proficiency of, 114 : consolidates the whole existing law in the **Corpus juris civilis** (q.v.), 121–5 : *and for sundry changes in the law made by Justinian, see* pp. 169, 170 (liberti), 172 (manumission), 175, 176 (dediticii, Latini Juniani), 178 (filiusfamilias), 181 (capitis deminutio minima), 185 (infamy), 212 (gifts), 311 (quiritary ownership), 320–22 (usucapio), 324 (specificatio), 363 (correal obligation), 383 (interest), 385 (suretyship), 389 (stipulatio post mortem), 439 (novation), 445 (compensatio), 467, 471 (dos), 474 (donatio propter nuptias), 481 (adoption), 482, 483 (noxal surrender), 486, 487 (emancipation), 534 ff. (intestate succession), 548–51 (wills), 558, 559 (succession by necessity), 571, 572 (legata and fideicommissa), 573 (quarta Falcidia), 577 (universal fideicommissa).
Justinus, 474.
Justus titulus, in usucapio, 320 : not required in usucapio pro herede, 517.

K

Kalendarium, 394 (1).

L

Labeo, M. Antistius, 94–8, 101, 104.
Laesio enormis, 408.
Land, separate ownership of, in early Roman law, 37, 42, 43 : ownership in, acquired by traditio in the later law, 314.
Latent defects, in a sale, 401.
Latifundia, 45.
Latini coloniarii, 175 (cp. 169).
— **Juniani**, 169 : legal position of, 175, 176 : not included in Caracalla's grant of civitas, 175 : abolished by Justinian, *ibid.*
Latium majus and minus, 175 (2).
Law, conception of, 22 : law and morality, 22–4 : public and private, 24–6 : origin of, 26 : customary and statute, 26 : local and general, 27 : absolute and subsidiary, 27 : absolute and permissive, 27 : law and right, 27 : law and equity, 28 : the system of, 33.
Law of Citations, 118, 119, 123 (3).
— **of Nature**, 149, 150 : effect of the, on the development of German law, 154, 155.
Legacy, *see* **Bequests** ; **Legatum**.
Legatum, 567–70 : an acquisitio civilis, 310 : a derivative mode of acquisition, 314, 315.
— **per damnationem**, discharged by nexi liberatio, 484, 485 : nature and effect of a, 567, 568, 569.
— **per praeceptionem**, 568, 569.
— **per vindicationem**, 567, 569, a mode of acquiring a servitude, 345, 567.
— **sinendi modo**, 568, 569.
Leges, as opposed to jus, 116, 117, 121, 124, 125.
— **Barbarorum**, 126.

Leges regiae, 54 (4).
— **Romanae**, 126, 127, 128, 130.
Legis actio, 229 ff.: effects of the oral litis contestatio in the, 240, 241: drawbacks of the, 78, 241, 242: only available as between Roman cives, 242: rivalry between the, and the formulary procedure, 244 ff.: superseded by the formulary procedure, 249, except in two cases, 250–1, 253.
— — **in factum and in jus concepta**, 233.
— — **per condictionem**, 232–4, 239 (16), 373 (1).
— — **per judicis postulationem**, 231, 232, 239 (16); cp. 62 (11).
— — **per manus injectionem**, 234–6, 239 (16).
— — **per pignoris capionem**, 236–8, 239 (14), 251 (13).
— — **sacramento**, 230, 231, 237, 238, 239 (16): continued use of the, in the centumviral court, 250, 515, and in an in jure cessio, 251: for enforcing a sponsio praejudicialis, 255.
Legitimation, 479.
Legitimi, in the praetorian edict, 532, 533.
Leoniana constitutio, 390.
Leo Philosophus, 132.
Lex, strict meaning of, 54: generalis (imperial statute), 112: collegii, 199: specialis, 28, 199: commissoria (in pledges), 353 (2), 356, (in contracts) 416: (cp. 54 (3)): perfecta and imperfecta, 208 (cp. 277).

PARTICULAR LEGES:

Lex Aebutia, 78, 247, 248, 251, 252, 253, 254.
— **Aelia Sentia**, 85 (1): as to manumissions, 171.
— **Aquilia**, 419–21.
— **Atilia**, 493.
— **Atinia**, 321, 322.
— **Calpurnia**, 232, 233 (5).
— **Canuleja**, 42 (15), 453.
— **Cincia**, 212, 277.
— **Claudia**, 491.
— **Cornelia** (de edictis), 77, 87.
— — (de injuriis), 422.
— — (de postliminio), 179.
— **duodecim tabularum**, *see* **Twelve Tables.**
— **Falcidia**, 573, 574.
— **Fufia Caninia**, 172.
— **Furia** (de sponsu), 385, note.
— — (testamentaria), 573, 574.
— **Julia** (de adulteriis), as to fundus dotalis, 467: as to divorce, 475.
Lex Julia (de cessione bonorum), 288
— — (de fundo dotali), 467.
— — (de maritandis ordinibus), 170 (6), 478.
— — **et Papia Poppaea**, *see* **Lex Papia Poppaea.**
— **et Plautia**, 321, 322.
— — **et Titia**, 493.
— — **judiciorum privatorum** (leges Juliae), 247, 248, 249 (16), 251, 253, 254.
— **Junia Norbana**, 169, 177.
— **Junia** (Velleja), 551, 554.
— **Laetoria**, 295 (5).
— **Licinia**, 42 (16).
— **Papia Poppaea**, generally, 478: prohibits certain marriages, 170 (6): as to orbi, 478, 566.
— **Pinaria**, 233 (7).
— **Plaetoria**, 294, 295 (*and see* 277), 489.
— **Poetelia**, 287, 372.
— **Ribuaria**, 35 (3).
— **Romana Burgundionum**, 126, 128 (3).
— — **Visigothorum**, 126, 127, 128, 129, 130.
— **Salica**, 35 (3).
— **Scribonia**, 345.
— **Silia**, 282.
— **Vallia**, 286.
— **Voconia**, 530 (1), 573, 574.
— **Zenoniana**, 350.
Liber Extra, 139 (1).
— **Kalendarii**, 394 (1).
— **Papiensis**, 135, 136.
— **Sextus**, 139 (1).
Liberi, in praetorian edict, 531, 532: praetorian rules as to the disinherison of, 555, 556.
— **naturales**, 458.
Libertas fideicommissaria, 168.
Libertus (**Freedman**), legal position of, 169, 170, 171: classes of liberti before Justinian, 169: could not summon his patron without leave from the praetor, 258, 262: Augustus' legislation as to liberti, 478: patron's tutela legitima over an unmarried liberta, 491 (3).
— **orcinus**, 168.
Libri feodorum, 138, 151.
Libripens, in a mancipatio, 48–50, 309, 542: in nexum, 50, 372, and nexi liberatio, 434: in coëmtio, 458.
Lien, 231.
Limitation of Actions, 282–4.
Lis infitiando crescit, 420.
Literal contract, 372, 374, 391 ff.: creates an obligatio stricti juris, 374,

892: how extinguished, 894, 895: *and* cp. 435, 436.
Litis aestimatio, 267, 286.
— contestatio, nature and object of, 226, 227, 230: constitutes the pith of the legis actio procedure, 240: effect of the, 285, 286: consumes the right of action, 240, 254, 282, 285: cannot be repeated, 240, 285: drawbacks of, 240, 241, 255, 256: rivalry between the, and the written formula, 244: effect of the lex Aebutia on the, 247–9: the formula a new, 253: effect of the, in a correal obligation, 363: effect of the, in an action by a procurator, 426: extinguishes an obligation, 446.
— denuntiatio, 399 (3).
Loan, for consumption, 375 (*see* **Mutuum**): for use, 376 (*see* **Commodatum**): formal, *see* **Nexum.**
Locare, literal meaning of, 405 (7),
Locatio conductio (**Letting and Hiring**), 404–6: cp. 376 (1), 381 (6): distinguished from precarium, 335 (5), and from commodatum, 376 (1).
Lombarda, 135, 137 (3).
Lombards, the legal instinct of the, 135: the Lombard jurists, 136: the feudal law of the, 138, 151: rivalry of the Lombard law in the Italian city-states with Roman law, 141-3.
Longissimi temporis praescriptio (**possessio**), 321.
Longi temporis praescriptio (**possessio**), 319, 345.
Lost property, 317.
Lucra nuptialia, 477.
Lucrativa causa, 488, 439.
Lucrum cessans, 369.
Lunatic, *see* **Furiosus.**

M

Magister, in a missio in bona, 287.
Magisterial guardianship, 493.
Magistrate, an edict is an order promulgated by a, 74: his jurisdictio and imperium, 76 (3): his arbitrary powers, 76, 77, 84: decline of his powers, 85–7: final supersession of republican magistracies, 297.
Maintenance, claims for, tried extra ordinem, 291: habitatio and operae servorum forms of, 341, 346: wife's right to, 464.
Malae fidei possessor, 327 (1), 411.
Mancipatio, the ancient formal sale per aes et libram, 48–50, 51, 53, 399 (3): how developed by the interpretatio, 58–63 (*and see* 480, 486), 81: only open to cives, 65, 173: could not be performed by a representative, 221: what things admitted of, 306, 307: an acquisitio civilis, 309: of rural servitudes, 343: of a filiusfamilias, 480, 481.
Mancipatio fiduciae causa, *see* **Fiducia.**
– sestertio nummo uno, 59: for what purposes utilized, 59-63.
Mancipatory will, *see* **Testamentum per aes et libram.**
Mancipium, original meaning of, 36: a sale into, involves a change of agnatio, 181: a child in mancipio was servi loco, 483 (cp. 463).
Mandata principis, 105, 106.
Mandatum (**Agency**), a consensual contract, 407, 408, 412 (4) (*and see* 420 (4)): oldest form of, 543.
— actionis (processual mandatum), 425, 426, 427.
— contra bonos mores, 408.
– in rem suam, 425, 426, 427.
— tua gratia, 408.
Manum depellere, injicere, 235, 236.
Manumissio, 167 ff.: formal modes of, 167–8: informal modes, 168, 169: effect of, 169, 170: restrictions on, 171–2: conditional (statu liber), 172: for purposes of an adoption, 480, and an emancipation, 486: in jure cessio first used for purposes of a, 57 (7).
Manumissor, Parens, in an emancipation, 486: tutela legitima of a, 491 (2): his rights of intestate succession, 531, 535.
Manus (**mariti**), nature of, 459, 460: confined to cives, 173: a wife in manu is legally a sister of her children, 449, 459 (cp. 462, 475): wife of filiusfamilias in the, of paterfamilias, 177: conventio in manum involves capitis deminutio minima, 181: early marriages not complete without, 452 (cp. 517, 518): how acquired, 453, 454: disappears in the Empire, 457: effect of, on wife's property, 462: how extinguished, 474, 475: a wife in manu is a suus heres of her husband, 463, 509, 533, and one of the liberi and legitimi, but not one of the cognati of the edict, 533.
Manus injectio, gives rise to a legis actio, 234, 235: extra-judicial, 234 (3): judicial, 234, 235: pura and pro judicato, 236: the only kind of execution in the early law, 286: *see* **Execution.**
Marcianus, 122.
Marcus Aurelius, 105 (2), 225 (on

self-help), 442, 446 (or the exceptio doli in a counter-claim), 495 (on guardians), 556 (on bonorum possessio contra tabulas).
Marital power, 459–62.
Marriage (**Matrimonium, Nuptiae**), 452 ff.: defined, 452, 458: requirement of manus for a 'justum matrimonium', *see* **Manus**: three forms of marriage with manus, *see* **Confarreatio, Coëmtio, Usus**: marriage by capture, 454 (3): strict and free marriages, 456: a free marriage becomes a justum matrimonium, 456–7: how concluded in Justinian's time, 457: termination of, 474 ff.: effect of, on property of wife, *see* **Husband and Wife**: between certain persons prohibited, 478: second marriages, 477.
Martinus, 185.
Materfamilias, only an uxor in manu strictly a, 456, 458, 459, 461.
Medicus, 109.
Mental reservation, 207.
Messenger, distinguished from a representative, 219, 220: informal juristic acts can be expressed through a, 207.
Metus (**Intimidation**), 209, 423: does not affect the validity of juristic acts by the civil law, 82, 84, 209, 276: praetorian remedies against, 209.
Miles, *see* **Soldier**.
Minor, is either **Infans** (q.v.), or **Impubes** (q.v.), or pubes minor (xxv annis), 217, 541: cura minorum, *see* **Cura**: in integrum restitutio minorum, 295–6.
Missio in bona, 287, 288.
— **in possessionem**, 290, 356.
Mistake, *see* **Error**.
Modestinus, Herennius, 100: writings of, in the Law of Citations, 118, 119.
Modus, 215: the statutory share must be given by a will free of, 557.
Mommsen, his edition of the Digest, 18, 20: his contributions to Roman legal history, 34 (1), 39 (2).
Money, part played by, in the economic development of Rome, 45, 53: no coined, before the XII Tables, 49: a res fungibilis, 305: a money obligation, *see* **Obligation**.
Mora, 370, 371: in mutuum, 375: in a depositum irregulare, 378: in sale, 398.
Morality and Law, 22–24.
Mores graviores and leviores, 469.
Mortis causa capio, 577, 578.
— — **donatio**, *see* s. v. **Donatio**.
Mother, her position in the agnatic family, 449, 459: is the type of the cognatic principle, 450: her position in the cognatic family, 460: has neither sui heredes, 509, 531, nor liberi, 531: is one of the praetorian 'cognati', 534: changes in law of succession as between mother and children, 535.
Motive, as affecting juristic acts, 208–12.
Municipium, a **Juristic person** (q.v.), 189 (*but see* 188 (1)).
Mutuum (**Loan for Consumption**), 372, 375: supersedes nexum, 64, 372: the object of, always a res fungibilis, 375, 381 (cp. 435 (1)): a stricti juris negotium, 373, 375 (cp. 383): gives rise to a condictio (certi), 375, 381: to a filiusfamilias, 375 (cp. 277).

N

Nasciturus, legal position of a, 164: may be instituted heir, 541, 550, 566 (cp. 576).
Natalium restitutio, 170.
Natural modes of acquisition, 309, 310, 311: *see* **Ownership**.
Naturalis obligatio, 414: a slave's contract creates a, 165, 429.
Nauta, 411, 425.
Negligence, *see* **Culpa**.
Negotia bonae fidei, 63, 265, 368–71: fiducia the first of the, 63: the genius of Roman law most conspicuous in the rules as to, 103: effect of a release in, 440: effect of a counter-claim arising ex eadem causa in, 441.
— **claudicantia**, 217.
— **mortis causa**, 206: *and see* 214.
— **stricti juris**, 265, 367: nexum the type and basis of the, 64: unfair operation of a pecuniary condemnatio in, 269 ff.: examples of, *see* **Literal contract, Mutuum, Stipulatio**: not affected by an agreement of release according to the civil law, 440: counter-claims in, 442, 443.
Negotiorum gestio, 411, 412, 429, 430, 431 (cp. 498, 512).
Nemo pro parte testatus etc., 507: soldiers exempt from the rule, 540.
Nexi liberatio, a formal mode of extinguishing certain obligations (per aes et libram), 434, 435: the bare form did not originally discharge

the debtor, 435 (1), (cp. 51 (6)): ceremony of, 436, 437.
Nexum, in the wider sense, 50: in the narrower sense of a formal loan, 50, 51, 53, 59, 372, 373: rigour of execution in, 51–2, 372: superseded by Mutuum (q.v.): the type and basis of stricti juris negotia, 64: could only be used by cives, 65: *and see preceding word.*
Nomen arcarium, 391, 392, 393, 395 (2), 396.
— transscripticium, 391, 392, 393, 395 (2), 396.
Nominatio potioris, 495.
Nominatores (Postulatores), 498.
Non usus, extinguishes servitudes, 345, 346.
Nota censoria, *see* Censor.
Nova clausula Juliani, 532 (3), 533 (4).
Novation, by stipulatio, 386–8 (by literal contract, cp. 395): compared with litis contestatio, 286: distinguished from assignment, 428: for purposes of a general acceptilatio, 436: compared with solutio, 438, 439: Justinian's enactment as to, 439.
Novels, 18: MSS. of, 21: collections of, 21, 125, 138: Post-Theodosian, 121, 128.

Particular Novels:

4th (beneficium excussionis), 385: 18th (statutory share of a deceased's estate), 558: 78th (liberti), 170: 84th (intestate succession of brothers and sisters), 535: 99th (beneficium divisionis), 363: 115th (succession by necessity), 559, 560: 118th (intestate succession), 536–40 (*and see* 484): 127th (intestate succession), 536, 537 (10), 538.
Noxae dare (Noxae datio, deditio), of a slave, 269, 272, 273, 425: of a wife in manu, 462: of a filiusfamilias, 483 (cp. 425): *and see* Actio noxalis.
Nudum jus Quiritium, 311.
— pactum, 414: cp. 375.
Nuncupatio, in a mancipatio, 59: how the interpretatio utilized the rule of the XII Tables as to, 59–63: in a mancipatory will, 542, 543, 544, (cp. 546).
Nuptiae, *see* Marriage.

O

Obligation (Obligatio), conception of, 358: distinguished from family and public rights, 358, 359: correal and solidary, 359 ff. (*see* Correal obligation): kinds of, 365: obligation to provide a thing, *ibid.*: money obligation, 365–6, 396 (1), cp. 564: alternative obligation, 366 (cp. 379 (1)): obligatio certa and incerta, 367: obligatio dandi and faciendi, *ibid*, 398: bonae fidei or stricti juris, 367–71: arises either ex contractu (*see* Contract), quasi ex contractu (408–14), ex delicto (*see* Delict), or quasi ex delicto (424–5), 371: natural, *see* Naturalis obligatio: transfer of an, 425–8: not assignable by the civil law, 425, 426 (cp. 259): liability for an, contracted by another, 428–33: modes of extinguishing an obligation operate either ipso jure, 433–40, or ope exceptionis, 433, 440–7: cp. Obligatory rights.
Obligations, The Law of, 358 ff.: place of, in the legal system, 159, 160: achievements of Roman jurisprudence in the domain of, 102–3.
Obligatory agreements, opposed to real agreements, 205.
— pacts, 414.
— rights, defined, 159: can only be enforced by action, 224, 225: distinguished from other, especially real rights, 263, 308: when destroyed by an assignment of an hereditas, 510 (3): *and see* Obligation.
Occupatio, an acquisitio naturalis, 310: an original acquisition, 317: of a derelict slave, 167: of res nullius, 304.
Odofredus, 136, 141 (3), 142 (4) and (5).
Omnia judicia sunt absolutoria, 97.
Ope exceptionis, defences operating, 275: modes of extinguishing obligations operating, 433, 440–7.
Operae illiberales, 109: are the subject-matter of locatio conductio operarum, 404.
— servorum, 341: not extinguished by non usus or capitis deminutio minima, 346.
Oratio, 107, 112: examples of an, 465, 496.
Orbi, incapacity of, 478, 566.
Original acquisition, 316–25: *see next word.*
Ownership, 309 ff.: conception of, 309: exclusive, earliest example of, 25: common ownership of the gens, 36, 37: development of individual ownership in early Roman law, 37 ff.: fiduciary, 63 (12): distinguished from jura in re aliena, 309, 338: acquisition of, 309–25: civil and natural

modes of acquisition (acquisitiones civiles and naturales), 309–11: quiritary and bonitary (dominium ex jure Quiritium and in bonis esse), 310, 311 (cp. 81, 82, 84): quiritary, only in res mancipi, 306: quiritary, abolished by Justinian, 169, 311: derivative acquisition of, 312–16: original acquisition of, 316–25: protection of, by rei vindicatio, 327, by actio negatoria, 327, 328, by actio Publiciana, 329, 330, by possessory remedies, 336, 337: distinguished from possession, 330: individual (private) ownership unknown in the earliest times, 501: ownership of the family, 501, 502.

P

Pacta, 414–16: adjecta, 414–15: legitima, 416: nuda, 414: praetoria, 416: vestita, 414.
Pactio et stipulatio, for creating a servitude, 344.
Pactum conventum, 61.
— de non petendo, 440: cp. 82, 84, 275, 276, 279.
— de vendendo, 352, 354, note.
— fiduciae, 61, 352.
Pandects, as a branch of legal study, 9 ff.: *see* Digest.
— the law of the, in modern Germany, 2 ff., 27, 150 ff.: its abolition, 7, 8, 10, 157.
Papian, 126, 128 (5).
Papinian, 99, 100, 101: writings of, in the Law of Citations, 118, 119, 120: in the Digest, 123, and in the Breviarium Alarici, 128.
Papirianum, Jus, 54 (4).
Papirius Justus, 120 (4).
Papyri, value of, 115.
Parapherna, Paraphernalia, 463, 465.
Partitio legata, 575 (1).
Partition suit (Judicium divisorium), an actio in rem scripta, 265: when necessary, 305, 315, 413: effect of an adjudicatio in a, 310, 315, 316: a 'judicium duplex,' 334 (4): three kinds of, 266, 413.
Partnership (Societas), 406, 407: distinguished from an incorporated society, 202, 203.
Paterfamilias, defined, 177, 178: *and see* Filiusfamilias, *and next word.*
Patria Potestas, place of the law of, in Family Law, 448: arises either by operation of law, 479, or by a juristic act, 479–482: was absolute in the early law, 482, otherwise in the Empire, 483: remedies for the assertion of, 483: effect of, on the property of the filiusfamilias, 177, 178, 484–5: how extinguished, 486–7: Roman and German conceptions of, 487: restricted to cives, 173: the old manus mariti indistinguishable from, 459, 460: community of, constitutes an agnatic family, 180, 181, 449, 460.
Patricians and Plebeians, 39–42.
Patricius, patria potestas extinguished, if the child became a, in Justinian's law, 486.
Patrimonium, 348.
Patronus, rights of, as against his freedman (jura patronatus), 170, 171 (*see* Libertus): patron and client, 38, 39, 172.
Paulus, Julius, 100, 101: writings of, in the Law of Citations, 118, 119, in the Digest, 100, 123 (5), and in the Breviarium Alarici, 128.
Pauperies, 425: *and see* 360 (2).
Peculium, of the filiusfamilias, 178, 484–5: *see* Bona adventicia, castrensia, materna, quasi castrensia: of a slave, 165, 428, 429.
— profecticium, 178, 485: son's contracts bound the father to the extent of the, 480, 485.
Penalty, recoverable by an action ex delicto, 266: stipulatio for payment of a specified, 384 (cp. 344).
Pendency, of a cause results from litis contestatio, 285: hereditas jacens the type of a legal relationship in a state of, 513.
Peregrini (Aliens, Foreigners), entirely excluded from the jus civile, 65, 173, 174 (cp. 242, 306, 453, 494, 548 (10)), unless privileged by treaty, 66, 173: consequent development of a law for (jus gentium), 67, 68, 71, 72 (*see* Jus gentium): enfranchised by Caracalla (q.v.): practical disappearance of distinction, between cives and, in Justinian's time, 176.
Periculum rei, in sales, 401, 402: in locatio conductio, 406.
Person, conception of, 160 ff. (*and see* 193, note): persons are either natural persons, 160, 164 ff., or juristic persons (q.v.), 160, 186 ff.: a slave not a, 37, 165.
Persons, The Law of, 161 ff.: its nature and place in the legal system, 159, 160.
Petitory action, 336 (cp. 289, note; 255 (3)).
Pia causa, 197, 198.

Pignora caedere, 236, 237 (14).
Pignoris capio (Distraint), Legis actio by, *see* Legis actio: as a mode of enforcing an order of the magistrate, 300.
Pignoris causa est individua, 357.
Pignus, as creating a jus in re, 353–4: contract of, 378: *see* Pledge.
— conventionale, 355.
— in causa judicati captum, 289.
— judiciale, 355.
— legale sive tacitum, 355.
— praetorium, 356.
— testamentarium, 355.
Pileatus, 169.
Plebeians, 39–42: cp. 172.
Pledge, right of, defined, 351: history of, 352–5 (fiducia, 352, 353: pignus, 353, 354: hypotheca, 354, 355, *and see* 82): rules of law as to pledges, 355–7, 416 (3): rights of pledgee, 356: nature of pledgee's possession, 331, 332: pledgee's possession reckoned in the pledgor's usucapio, 320: priority as between pledgees, 357: privileged rights of, 357 (cp. 471): how extinguished, 357: contract of, 378.
Plurality of debtors and creditors, 359 ff.
Plus petitio, 269.
Poenae secundarum nuptiarum, 477.
Pomponius, Sextus, 98.
Pontifices, controlled the development of the early civil law, 56, 88–91: the judges bound by the responsa of the, 92: decline of their influence, 92, 93: their conflict with the praetor, 246, 247.
Poor, institution of the, as heirs, 197, 198.
Portio virilis, 538, 554.
Possession, 330 ff.: distinguished from ownership, 330, 337: when, called 'detention', 331: juristic possession, 332, 333 (cp. 312, 313): 'derivative juristic possession,' 332 (2) (*and see* 320): protection of juristic possession (interdicta possessoria), 333–6: possession vi, clam, precario, 333, 334, 335, 336: quasi (juris) possessio, 347, 350, 562: longi temporis possessio, 319, 345: usucapio possession, how protected, 328–30: usucapio possession of an intended wife in the old law, 454–5: the principle of representation first applied in the acquisition of possession, 221.
— pro herede, 562, 563, 565.
— pro possessore, 562, 563, 565, 566.
Post-Glossators, 140 ff.
Postliminium, 179, 317.
Postulare, 183: *and see* 185.
Postulatio judicis, 231, 233, 239 (16): cp. 62 (14).
— tutoris, 493.
Postulatores, 498.
Postumi, were 'personae incertae', 550: institution and disinherison of, 554–5.
— Aquiliani, 555.
— legitimi, 554.
— sui, 508: *and see* 550, 554.
— Vellejani, 554.
Potestas, *see* Dominica and Patria potestas.
Potioris nominatio, 495.
Praedicere, 385 note.
Praedium dominans and serviens, 342.
— rusticum, 342: cp. 496.
— suburbanum, 496.
— urbanum, 342.
Praefectus praetorio, 297.
— urbi, 297.
Praejudicium (actio praejudicialis), 264, 266: formula in a, 267: cp. 483.
Praescriptio (a plea), longi temporis, 319: longissimi temporis, 321: cp. 283.
Praescriptio obreptionis and subreptionis, 298 (2).
Praescriptis verbis agere, *see* Actio in factum civilis.
Praesides provinciarum, edict of the, 86: their jus edicendi virtually destroyed by Hadrian, 297: their use of the extraordinary procedure in later times, 298: introduced the praescriptio longi temporis, 319.
Praestationes personales, 413, 564.
Praeteritio, of sui, 554: of postumi sui (civil law), 555: in the praetorian law, 555.
Praetermittere hereditatem, 524 (14).
Praetor, literal meaning of, 74 (1): had no power to legislate, 78: growth and decline of the power of the, *see* Edict of the Praetor; Formula; Jus gentium: his character changes during the Empire, 297: could not make a person heres, 525, 529 (*see* Bonorum possessio).
— fideicommissarius, 108, 111, 570, 571.
— peregrinus, appointment of, 67, 73, 242: develops the jus gentium, 67, 68, 78: works out the formulary procedure by the aid of the jus honorarium, 242–5: his practice of appointing several recuperatores, 243: the procedure in his court not affected by the lex Aebutia, 248.
— tutelaris, 493.

Praetor urbanus, 73: jurisdiction of the, 74, 78: conflict between the formulary and the legis actio procedure in the court of the, 246–8: statutory reforms in the procedure of the, 248, 249.
Precarium (Permissive Possession), 335 (8), *and see* 40: how protected, 334–6 (cp. 291, 292): juristic possession of precario habens, 332 (2), 335 (5): *see also* 320 (1).
Prescription, *see* **Usucapio**: acquisitive, in the Canon Law, 139.
Princeps (Principatus), 104, 105.
Principal and Agent, *see* **Agency**.
Prior tempore potior jure, 357.
Private Law, 24–6: nature and system of, 158–60; in its older forms a 'civil' law, 173.
Private property, what is, 186: attacks on, 161, 162: *see* **Ownership**.
Privilege, technical meaning of, 28, 199.
Procedure, Law of, 224 ff.: a branch of public law, 26: extra ordinem, *see* **Extraordinary Procedure** and **Roman Civil Procedure**.
Processual Agency, 425–7.
— **agreement**, 244, 247, 249, 250, 252, 253, 255, 256.
Proculians, 94, 96, 97, 98.
Proculus, 94, 96.
Procurator, 221, 222: for purposes of an action (processual agent), 425–7: an 'infamous' person cannot have a, 183 (3).
Prodigus, has imperfect capacity of action, 216 (cp. 217): has delictual capacity, 219: statutory cura of a, 489, 492, 499: cannot make a will, 541, nor witness a will, 548 (10).
Pro herede gestio, a valid 'aditio', in the classical law, 511, 512, not in the older law, 516 (1) (cp. 518 (2), 520 (7)).
— — **possessor**, 562, 563, 565, 566.
Pronuntiatio, 267, 271.
Property, Law of, 204 ff.: in what sense identical with Private Law, 25: meaning of, and place in the legal system, 158, 159, 160.
Proprietary capacity, the law of persons is concerned with, 159, 160: is the leading characteristic of a 'person', 161, 218: cp. **Juristic persons**: distinguished from capacity of action, 218, 219: of a filius-familias, *see* **Filiusfamilias**.
Protection, of rights in general (Law of Procedure), 224 ff.: of ownership, 327, 328, 329, 330, 336, 337: of usucapio possession, 328–30: of juristic possession, 333–6: of servitudes, 346–8: of other jura in re, 349, 351, 356.
Protutor, 498.
Provincial soil, *see* **Fundus provincialis**.
Provocatio, 228 (5).
Prussian Landrecht, 6, 11.
Pubertas, 218.
Public Law, contrasted with Private Law, 24–6: 'civil' exceptiones give effect to a rule of, 277 (*and see* 86 (4), 254 (2)).
Pupillus, *see* **Ward**.
Putativus titulus, 320 (1).

Q

Quanti ea res est, *see* **Interest**.
Quarta divi Pii, 480.
— **Falcidia**, 573, 574, 576, 578.
— **Trebellianica**, 577.
Quasi contractus, 371, 408–14.
— **delicta**, 371, 424, 425.
— **possessio**, *see* **Possession**.
— **traditio**, 82, 344, 347.
— **ususfructus**, 340.
Querela inofficiosae donationis sive dotis, 558.
— **inofficiosi testamenti**, 556–60: barred within five years, 283 (1), 558: when brothers and sisters may bring a, 185, 557, 560.
Quidquid non agnoscit glossa etc., 151 (2).
Quinquaginta decisiones, 123 (10), 124 (12).
Quiris, 35, 42.
Quiritary law, 33 ff.
— **ownership**, *see* **Ownership**.
Quot generationes tot gradus, 451.

R

Rapina, 419 (*and see* 417 (1)).
Ratio scripta, 6 note, 71.
Ravenna, School of, 134, 136.
Real actions, *see* **Actio in personam and in rem**.
— **agreements**, 205.
— **contracts**, 372, 375 ff.: nominate, 375–8: innominate, 378–81, 409; essential difference between the two classes, 379 (3).
— **rights**, nature and purpose of, 159, 303, 307–9; distinguished from obligatory rights, 159, 263, 308.
Reallast, 3.
Reception, of Roman Law in Germany, 1, 2, 151 ff.: of Canon and Lombard law, 151, 152.
Receptum nautarum etc., 411.

Recuperatores, when appointed, 227 (3) : *and see* 66, 243, 244, 247 (9).
Regula Catoniana, 90 (3).
Reichskammergericht, 6 (1), 152–4.
Relations, *see* **Family**.
Release, formal, *see* **Acceptilatio**; **Nexi liberatio**: informal, *see* **Pactum de non petendo**.
Remancipatio, divorce by, 475, 491 (2): in adoptions, 481: in emancipations, 486.
Remissio, of rent, 405.
Remotio suspecti tutoris, 499.
Replicatio, 281, 282: example of a, 440.
Representation, 219 ff.: representative and messenger distinguished, 219, 220: two forms of, tutorial and procuratorial (**Agency**, q. v.), 220: Roman and modern principles of, 220–2: of an undisclosed principal, 223: involuntary, 223 (cp. 166, 177, 484): by an adstipulator, 389, 390: by a mandatary, 407: liability of principal for contracts of representative, 431–2.
— **right of**, in the rules of succession, 536, 537, 538.
Repromissio, 255 (3).
Repudiatio hereditatis, 511, 524, 526: cp. 523.
Repudium, 475, 476.
Res, defined, 302: kinds of, 302–7: different unions of, 325–7: *see also* **Things**.
— **consumtibiles**, 304: quasi-usufruct in, 340.
— **corporales and incorporales**, 302.
— **derelictae**, 317 (cp. 167).
— **divini juris**, 302, 303.
— **extra commercium**, 302, 303 (*and see* 187, 188, 189): incapable of usucapio, 321.
— **fungibiles**, 305: the subject-matter of mutuum, 375 (cp. 435 (1)): in a depositum irregulare, 377: how dealt with on the return of a dos, 467, 468, 469.
— **furtivae**, 321, 322.
— **in commercio**, 189, 304–5.
— **inhabiles**, 321.
— **mancipi and nec mancipi**, 36, 37, 53, 69, 305–7 (cp. 516, 517): full ownership in res mancipi can only be obtained by an acquisitio civilis, 310 (cp. 58 n., 81).
— **nullius**, 304 (*and see* 188), 317.
— **omnium communes**, 303, 304.
— **publicae**, 303: *and see* 187, 188, 189, 290, 291.
— **quae pondere numero mensurave constant**, *see* **Res fungibiles**.
Res religiosae, 303: *and see* 166, 291.
— **sacrae**, 302, 303: *and see* 189, 291.
— **uxoria**, dos was in substance, 465, 467, 472.
— **vi possessae**, 321, 322.
Rescripta (principis), 105, 107, 108, 113: action 'by rescript', 298 (2).
Responsa, pontifical, 92: Augustus orders all, to be given ex auctoritate principis, 92: responsa prudentium (jus respondendi), 93: the authority of, extended to the literature of responsa, 93, and to juristic literature in general, 117, 118: replaced by imperial rescripts, 100.
Restipulatio, Sponsio and, 292 (cp. 255).
Restituere, 268 (1), 273 (5).
Restitutio, *see* **In integrum restitutio**.
Retainer, husband's rights of, on the dissolution of a marriage, 468, 469, 471.
Retentio (lien), 281.
Right, and Law, 27; real, obligatory, *see* **Real rights**; **obligatory rights**.
Robbery, 419 (*and see* 417 (1)).
Roman Civil Procedure, 225–9: authorities on, 225 (1): early, a form of self-help, 239 (16): in the later Empire, 296–301: *and see* **Legis Actio**; **Formula**; **Formulary Procedure**.
Roman Jurisprudence, *see* **Jurisprudence**.
— **law**, reception of, *see* **Reception**: relation of, to the law of modern Germany, 2 ff.: history of, as a branch of legal study, 8, 9, 13, 14: sources of, 16–19: permanent value of, 13, 102, 103, 130: regarded by the Glossators as the universal law, 142.
Romantic movement, 155.
Rupitiae, 420 (4).
Ruptio testamenti, 555.

S

Sabinians, 94, 96, 97, 98.
Sabinus, Masurius, 93, 94–8, 101: writings of, in the Digest, 122.
Sacramentum, 231: meaning of, in Low Latin, 96 (12).
Sale, *see* **Emtio venditio**; **Mancipatio**.
Savigny, 11: his History of Roman Law in the Middle Ages, 133: rehabilitates the scientific study of the Pandect law, 155: his theory of law, 155, 156: on Possession, 156 (cp. 332 (2)): his 'System', 157.

Saxon Civil Code, 6.
Scaevola, Q. Cervidius, 99.
— Q. Mucius, 90, 91, 92.
Scholasticism, 145–7.
Schools of Law, in Rome, 94–8: School of Ravenna, 134, 136: School of Lombardic law (Pavia), 135: School of Glossators (Bologna), 135–8, 142: School of Post-Glossators, 140 ff.: French School of historical jurisprudence, 151: Dutch School, 151: Modern Historical School (Savigny), 155–7.
Second Marriages, 477.
Self-defence, 224.
Self-help, 224, 225 (cp. 105 (2)): early civil procedure a form of, 239 (16).
Self-pledge, for debt in the early law, 64: cp. 51, 52 (7).
Semel heres semper heres, 550.
Senate, in the regal period, 34: during the Republic and early Empire, 106–7.
Senatusconsultum, generally, 86 (4), 106–7.
— Juventianum, 562.
— Macedonianum, 375: exceptio founded on the, 277: cp. 85 (2).
— Neronianum, 568, 570.
— Orphitianum, 535.
— Pegasianum, extends the quarta Falcidia to fideicommissa, 573, 576, 577: cp. 277 (3).
— Tertullianum, 535.
— Trebellianum, 575, 577: cp. 85 (2), 277 (3).
— Vellejanum, 385: exceptio founded on the, 277, 386: cp. 85 (2).
Sententia, meaning of, in Roman civil procedure, and distinguished from a decretum, 227, 228, 229, 290: disappearance of the distinction, 299.
Separate property, of married women: *see* Husband and Wife.
Separatio bonorum, 561.
Sequester, 332 (2).
Service, Contracts of, 109.
Servitudes, 338–48: are either personal, 339–41, or real (praedial), 342: real, are either rural or urban, 342, 343: rural, in Italy are res mancipi, 307, 343: rights of the person entitled to a servitude, 342, 343: duties of the owner of the res serviens, 343: how acquired, 343–5 (*and see* 82): how extinguished, 345–6: effect of capitis deminutio on, 181, 345, 346: protection of, 346–8: quasi possessio of, 347, 350: distinguished from emphyteusis, 350, and superficies, 351.

Particular Servitudes:

Servitus actus, itineris, viae, 342, 343.
— altius non tollendi, 342, 343, 346.
— aquaeductus, 342, 343.
— aquae hauriendae, 342.
— ne luminibus officiatur, 343.
— oneris ferendi, 342, 343.
— stillicidii, 342, 343.
— tigni immittendi, 342, 343, 346.
Servius Tullius, 37, 40, 54 (4): the 'Servian Constitution,' 37, 40.
Servus, *see* Slave.
— poenae, 167.
Set-off, *see* Compensatio.
Severus, Septimius, 99: ordinances of, 166 (slaves), 496 (property of wards): cp. 107 (4).
Shipowner, 411, 425.
Singular Succession, to a right, 312: to an obligation, 427: to a legacy, 567: on a sale of an inheritance, 575: *and see* Succession.
Slave (Servus), Slavery, 165 ff.: legal position of a slave, 165–6: legally not a 'person', 37, 165: protection of slaves, 108, 166: contracts of slaves, 165 (1), 428–30: delicts of, 165 (1), 425 (*see* Noxae dare): position of a slave in the jus sacrum, 166: how slavery originates, 167: slavery terminated by Manumission (q. v.), 167 ff.: relationships akin to slavery, 172: involuntary representation by a slave, 223 (cp. 166, 221): slave of a corporation, 190, 195: marriage of a slave, 458: a slave a res mancipi, 36, 69, 307: may be instituted heir (cum libertate), 510.
Sobrinus, 533.
Social property, 162, 186, 193 (2), 196.
— War, 174.
Societas, or Partnership (q. v.), 406, 407: in the sense of a society, 199.
Societies, as juristic persons, 195 ff.: in modern German law, 200, 201.
Sodalitates, 187, 190.
Solarium, 350.
Soldier, privileges of a, in regard to wills, 540, 542, 548 (cp. 106 (3)): privileges of a filiusfamilias miles, *see* Bona castrensia.
Solidary Obligation, 361–4, 564.
Solutio, as a mode of extinguishing an obligation, 437, 438, 439: imaginaria, 434, 435, 436, 437.
— indebiti, 408, 411.
Solutionis causa adjectus, 438.
Sources of Roman law, 16–19.

Species perit ei cui debetur, 365, 402.
Specificatio, 324, 326, 327.
Sponsalia, 457.
Sponsio, original nature of, 64, 374, 382 (1), 384 (3): procedure by sponsio (agere per sponsionem), 255 (cp. 75): praejudicialis, 255: poenalis, 255 (5): sponsio and restipulatio based on a previous interdict, 292: passes into **Stipulatio** (q.v.), 374: originally only created a moral obligation, 64 (16), 382 (1), (cp. 457): as a form of suretyship, 49 (18a), 384 (3).
Stabularius, 411, 425.
Statu liber, 172.
Status, three kinds of, 165: loss of, 178, 179: questions as to, tried by praejudicia, 264.
Statute law, opposed to Customary law, 26: binding on the magistrate, 54, 88: statute laws of the Italian city-states, 141–4: personal, real, and mixed statutes, 149: Savigny on, 156.
Statutory guardianship, 492.
— **share**, in the law of inheritance, 553: who entitled to a, 557: rules as to amount of the, 557, 558, 559: effect of not giving the, before Justinian, 557, under Justinian, 559, 560.
Stipulatio, 382–91: the outcome of sponsio, 64, 374, 382 (1): forms of, 382, 390: either originates an obligation, 383–6, or transforms (novates) an obligation (*see* **Novation**), 386–7: nature of, 388 (cp. 221, 367): how enforced, 388: how extinguished, 435, 436, 437, 440.

PARTICULAR STIPULATIONES:

Stipulatio onerandae libertatis causa, 171: stipulatio of indemnity against 'apprehended damage', 251 (13): for payment of interest, 375, 383: for payment of a specified penalty, 384 (cp. 344): of suretyship, 384–6: of betrothal, 382 (1), 457: post mortem, 389, 390: duplae, simplae, 399 (3): Aquiliana, 436, 437: for the return of a dos, 468: on the sale of an inheritance, 575: partis et pro parte, 575 (1).
Stoic Philosophy, influence on Roman jurisprudence, 90.
Stricti juris negotia, *see* **Negotia stricti juris**.
Subscriptio, a form of rescript, 105, 107: to a will, 548.
Substitution, 550: simple (vulgaris) and pupillary, 552 (4): pupillary substitutions in wills not satisfying the rules of succession by necessity, 556, 559.
Successio graduum, 530: not recognized in the early civil law, 523, 530: compensated for by the in jure cessio hereditatis, 510 (2): recognized by the praetor as between cognati, 534: in the 118th Novel, 538.
— **in capita and in stirpes**, 536, 537, 538.
— **ordinum**, 530: not recognized in the early civil law, 523, 530: recognized by the praetor, 534 (*and* cp. 525, 531): in the 118th Novel, 538.
Succession, hereditary, foundation and conception of, 501 ff.: three kinds of: **intestate** (q.v.), **testamentary** (q.v.), and succession by necessity (*infra*), 502: order of precedence as between the three kinds, 506: universal and singular, 503–5: universal succession within the meaning of the Roman law of inheritance defined, 504: is strictly a continuation, 505 (cp. 509).
— **by necessity**, 502: overrides testamentary succession as a ground of delatio, 506: earliest law of, 551–2: formal law of, 553–6: material law of, 556–8: fusion of the formal and material law by Justinian, 558, 559, 560.
Sui heredes, *see* **Heres domesticus**.
Summae, of the Glossators, 136.
Superficies, 350, 351.
Superscriptio, 547 (9).
Suretyship, Fidejussio (q.v.), 384–6: other forms of, 384 (3).
Suspecti tutoris accusatio, 499.
Syngraphe, 395 (3).
Syrio-Roman Book of Law, 115 (3), 121 (5).
System, of Law, 33: of private law, 158–60: of Roman private law, as a branch of legal study, 13, 14.

T

Talio, 422 (7).
Tempus ad deliberandum, 511.
— **continuum**, 284.
— **utile**, 284 (cp. 400, 419, 423, 527).
Testamentary guardianship, 492, 493.
— **succession**, 540 ff.: not known in the earliest law, 502, 522: rules of, bear witness to the rights of the

individual, 502: operates a delatio hereditatis, 506: testamentary and intestate succession mutually exclusive, 506: *and see* **Wills.**
Testamentifactio, activa, 541: passiva, 541, 550: in the sense of being competent to witness a will, 548 (10): *and see* **Incapacity.**
Testamentum, *see* **Wills.**
— **apud acta conditum**, 549.
— **caeci**, 549.
— **calatis comitiis**, 542, 545.
— **inofficiosum**, *see* **Querela** etc.
— **in procinctu**, 542, 545.
— **militis**, 548: *and see* **Soldier.**
— **parentis inter liberos**, 549.
— **per aes et libram** (Mancipatory will), 542-5, contrasted with fiducia, 62 (15), 543.
— **pestis tempore**, 548.
— **principi oblatum**, 549.
— **ruri conditum**, 649.
Testari, strict meaning of, 544 (7).
Theft, *see* **Furtum.**
Theodoric the Great, Edict of, 126.
Theodosius, Code of, 118 (1), 121, 124, 128, 129 (8): on the limitation of actions, 283: on promises to give a dos, 466: on the right of children to succeed to their maternal ascendants, 535.
Theophilus, 122, 132 (1).
Thesaurus, 317.
Thing, *see* **Res**: divisible and indivisible things, 305 (*and see* 315): the Law of Things, 302 ff.: its place in the legal system, 159, 160.
Tiberius (Emperor), 98.
Tiberius Coruncanius, 89, 91.
Titulus putativus, 320 (1).
Traditio, defined, 312: an acquisitio naturalis, 310: a derivative mode of acquisition, 312-14: requirement of 'causa traditionis', 313 (cp. 403): was a product of the jus gentium, 314: application of the rule of XII Tables as to res mancipatae to, 49 (2a), 69: a fiducia could not be effected by, 63 (15): passed ownership in res nec mancipi, 68, 69: no deductio possible in, 343 (1).
— **brevi manu**, 312, 313.
Tralaticium edictum, 77, 84.
Transactio, *see* **Compromise.**
Transfer, of obligations, 425 ff.: of an hereditas legitima, 510 (3) (cp. 57 (7)): of an inheritance, 575-7.
Transmissibility, the result of litis contestatio, 286, 558: active and passive, 423 (*and* cp. 470, 501).
Transmission of liabilities, importance of, in the law of inheritance, 503, 504, 505.
Transscriptio, a persona in personam, a re in personam, 394, 396.
Treasure trove, 317.
Tres faciunt collegium, 203.
Tribonian, 122, 123.
Tribunes, 42 (16), 493.
Tribus, 35: urbanae and rusticae, 37 (6), 169, 170.
Trinoctium, 454, 455, 456, 458.
Triplicatio, 281.
Trust, Family, 3, 4: *and see* **Fiducia; Fideicommissum.**
Turpitudo, 184, 185.
Tutela, a form of **Guardianship** (q.v.), 488: distinguished from cura, 488, 489: essence of, is **Auctoritatis interpositio** (q.v.): two cases of, impuberum and mulierum (*infra*), 489: how it devolves on a person, 492, 493: creates a quasi-contractual liability to the ward, 412: *see also* **Guardian.**
Tutela cessicia, 491 (2).
— **dativa**, 493.
— **impuberum**, 216, 217, 489.
— **legitima**, 492.
— **legitima mulierum**, three forms of, 491 (2): assignable by in jure cessio, 58 n., 491 (2): abolished by the lex Claudia, 491.
— **mulierum** (*for one form of which see preceding word*), 490, 491, 541: women freed from, by the jus liberorum, 478.
— **testamentaria**, 492, 493: appointments of testamentary guardians in wills not satisfying the rules of succession by necessity, 556, 559.
Tutor Atilianus, 493.
— **ex lege Julia et Titia**, 493.
— **fiduciarius**, 491 (2).
— **gerens and honorarius**, 496. *See further* **Tutela.**
Tutoris postulatio, 493.
Twelve Tables, of the Decemviri, 48 ff.: the chief juristic acts in the, 48-51: characteristics of the law of the, 48, 58: interpretation of the, *see* **Interpretatio**: remained formally in force till Justinian, 55, 114: on mancipatio, 48, 49: on giving security in a sale, 49 (2a): on personal execution (manus injectio), 52: on confessio in jure, 56: on sale of children, 58, 480, 482 (cp. 486, 487): on the force of the nuncupatio in nexum and mancipatio, 59, 61, (*and see* 544, 545, 546): on liability of vendor to indemnify an evicted

purchaser, 59 (10) : on infamy, 183 (1) : on arbores succisae, 232 (3), 241 : on in jus vocatio, 234 (9) : on manus injectio, 235 (11) : on the period of usucapio, 319 (cp. 454, 516) : on the usucapio of res furtivae, 321 : on the rate of interest, 383 : on damage by rumpere and carmen famosum, 422 (7) : on injuria, 422 : on usurpatio (by trinoctium), 454, 455, 456, 458 : on guardianship, 491 (2), 493 : on the cura of prodigi and furiosi, 494 : on intestate succession, 530, 531 : on the division of a deceased's debts between co-heirs, 564 : on liberty of testation, 574.

U

Ulpian, 100, 101 : writings of, in the Law of Citations, 118, 119, and in the Digest, 100, 123 (6).
Unions of things, 325-7 : union, in the narrower sense, 326.
Unitas actus, in the execution of a will, 548.
Universal fideicommissum, *see* Fideicommissum.
— succession, *see* Succession.
Universitates, as juristic persons, 190, 195.
Unworthiness, of an heir, 566.
Usucapio, 318-22 (cp. 260) : a civil mode of acquisition, 310 : rules of the XII Tables on, 319 : longi temporis possessio (praescriptio), 319 : changes by Justinian, 320, 321, 322 : requirements of justus titulus and bona fides, 320 : what things incapable of, 321 : extraordinary usucapio, *ibid.* : twofold function of, in the classical law, 321, 322 : function of, in Justinian's law, 322 : of servitudes, 345 : usucapio libertatis, 346 : original purpose of, 517.
— possession, *see* Possession.
— pro herede, does not require bona fides, 320 (1), 517 : bonorum possessio supposed to have originated in, 516-18 : excluded by the existence of sui heredes, 520 (6) : interrupted by cretio, 521 (11) : purpose of, 524 (cp. 530) : regulated by the praetor, 525 : effect of, weakened under Hadrian, 562.
Usurae, *see* Interest.
Usureceptio ex fiducia, 63 (15), 320 (1), 353 (1).
Usurpatio, 454, 455 : cp. 458.
Usury, prohibition of, in the Canon law, 139 : *and see* 410.
Usus (a servitude), 340, 341 : *and see* Servitudes.
— (as a mode of creating manus), 454-5, 458 (cp. 517) : marriage by, how dissolved, 475.
Usufructus, 340, 341 : the right itself inalienable, 340, 467 (2) : of father in bona adventicia, 178, 485 : of a widow in respect of part of her husband's estate, 538 : *and see* Servitudes.
Usus modernus (Pandectarum), 152 (3), 156, 157.
Uterini, 451.
Uti lingua nuncupassit, ita jus esto, 59, 61, 344 (1), 544.
Uxor, strict meaning of, 456, 458 : uxor in manu, *see* Manus.

V

Vadimonium, object of, in the old law, 384 (3) : *and see* 49 (2a).
Valentinian II, enactment of, as to the intestate succession of children, 535.
— III, the Law of Citations of, 118, 119, 120 (2), 123 (3).
Vas, *see* Vadimonium.
Vaticana Fragmenta, 120 (2).
Vectigal, 348, 349.
Venditio bonorum, 287 : *see* Bonorum emtor.
— sub hasta, 310.
Vera rei aestimatio, 369.
Verbal contract, 382 ff. : *see* Stipulatio.
Vespasian, grants the jus Latii to Spain, 110.
Vestalis, Virgo, a daughter becoming a, is freed from patria potestas, 486.
Via, 342, 343.
Vim vi repellere licet, 224.
Vindex, in a manus injectio, 235, 236.
Vindicatio, 227 (3), 239.
— caducorum, 478.
— filii (in potestatem), a real action, 264 : in adoptions, 481 : object of, 57, 483.
— hereditatis, 227 (3).
— in libertatem, 57, 167 (cp. 235, 236) : tried by recuperatores, 227 (3).
— in servitutem, 168.
— juris, an action to assert a servitude is a, 346, 347, 350 (3), 567.
— rei, an action claiming ownership, 260, 264, 327, 328, 329, 561 : opposed to a juris vindicatio, 346, 350 (3) (cp. 567) : utilis, for protection of emphyteusis, 348, 349 : *and see* 268.

Vindicias dare, 239, 515.
Vis absoluta, 209.
— compulsiva, 209.
— ex conventu, 255 (3).
Vocatio, In jus, *see* In jus vocatio.
Voet, 151.
Voluntary jurisdiction, 250.

W

Ward, a minor (pupillus), *see* Minor; a woman, *see* Tutela mulierum; a lunatic, *see* Furiosus; a prodigal, *see* Prodigus: *and see* Guardians, Guardianship.
Way, Rights of, 342.
Widow, must not re-marry within a year, 477, on pain of certain disabilities, 477, 566: may sometimes apply for the tutela of her children, 494: claims of, against the husband's estate, 464, 538: rights of succession to husband, *see* Husband and Wife.
Wild animals, 304, 317.
Will, one of the requisites of a juristic act, 206-7: tacit expression of the, 208.
Wills, are negotia mortis causa, 206: develop with the idea of private ownership, 502 (*see* Testamentary succession): probably originated in adoptions, 507, 542: must be in respect of the testator's whole estate, 506: who can make a will, 541: who can be heir or legatee in a will, *see* Testamentifactio (passiva), Incapacity: general rules as to, 540-1: wills in the early civil law, 542-5: the mancipatory will, *see* Testamentum per aes et libram: praetorian wills, 546-7: a will becomes a unilateral instead of a bilateral juristic act, 547, 550 (cp. 205): in Justinian's law, 548-51: (ordinary forms of will, jus tripertitum, 548, 549: oral wills, *ibid.*: special forms of wills, 548, 549: privileged wills, 549: original idea of, 551: gradual development of complete liberty of testation, 552: liberty of testation in the XII Tables, 574: filiusfamilias can dispose of what property by will, 484, 485, 541: effect of praeteritio on, *see* Praeteritio: effect of a querela inofficiosi testamenti on, *see* Querela, &c.: of soldiers, *see* Soldier: manumission by will, 168: of cives dying in captivity, 179: *for various kinds of wills see* s.v. Testamentum.
Witness, to a will, who cannot be a, 548 (10): the judge may decline to admit an infamis as a, 184.
Women, incapable of intercessio, 277, 385: no arrogatio of, 479: cannot adopt, 481: subject to guardianship, *see* Tutela mulierum: restriction of rights of, to take under a will, 530 (1): cannot witness a will, 548 (10).

Z

Zeno, on emphyteusis, 349, 350.
Zweckvermögen, 198 (2).

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